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No. 05-702

In The
Supreme Court of the United States

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Petitioners,

v.

KENNETH S. ROBINSON, in his official capacity as the Commissioner of the Tennessee Department Of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Tennessee law prohibits out-of-state businesses selling prescription eyewear from making space available, at their in-state stores, for state-licensed optometrists to provide eye examinations. The State, however, allows its own licensed optometrists to offer this one-stop shopping that consumers prefer by authorizing them to sell retail prescription eyewear at the same location where they provide eye examinations. The questions presented are:

1. Whether the court of appeals erred in holding, contrary to this Court's precedent and broadening a conflict in the circuits, that state discrimination disadvantaging all out-of-state businesses in favor of their primary in-state competitors is not a violation of the Commerce Clause because the businesses are not "similarly situated" even though they compete in the same retail market for the same customers.

2. Whether, in applying the balancing test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to identify violations of the Commerce Clause, a court must consider the totality of the burdens on interstate commerce, rather than only the burdens that arise because of discriminatory treatment of out-of-state competitors, an issue that has divided the courts of appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner LensCrafters, Inc. is an Ohio corporation wholly owned by Luxottica Group, S.p.A., a publicly held company, through the following intervening companies: LensCrafters, Inc., is owned by The United States Shoe Corporation, which is owned by Avant Garde Optics, L.L.C., which is owned by Arnette Optics Illusions, Inc., which is owned by Luxottica U.S. Holdings Corp., which in turn is owned by Luxottica Group, S.p.A.

Petitioner Cole Vision Corporation is a Delaware corporation wholly owned by Luxottica Group, S.p.A, a publicly held company, through the following intervening companies: Cole Vision Corporation is owned by Cole National Group, Inc., which is owned by Cole National Corporation, which is owned by Luxottica U.S. Holdings Corp., which in turn is owned by Luxottica Group, S.p.A.

Petitioners U.S. Vision and the National Association of Optometrists and Opticians have no parent corporations, and no publicly held corporation owns 10% or more of them.

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The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 403 F.3d 798. The opinion of the district court granting respondents' motion for summary judgment (App., *infra*, 17a-84a) and an order amending that opinion (App., *infra*, 85a-89a) are reported at 248 F. Supp. 2d 705. The opinion of the Tennessee Supreme Court on certification from the district court on a relevant state law question (App., *infra*, 90a-103a) is reported at 33 S.W.3d 772.

JURISDICTION

The court of appeals entered its judgment on April 14, 2005. A petition for rehearing and rehearing *en banc* was denied on July 29, 2005. App., *infra*, 104a-105a. On October 17, 2005, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including November 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. Art. I, sec. 8, cl. 3, provides that "Congress shall have power to * * * regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Section 63-8-113(c)(6) of the Tennessee Code provides that it is unlawful for any licensed optometrist to "[p]ractice or offer to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale."

STATEMENT OF THE CASE

1. Facts

a. More than 60% of the population of the United States, including more than 90% of those over 54 years old, buy prescription eyewear, spending almost $16 billion a year on such purchases. C.A.J.A. 832-833.[1] In order to buy prescription eyewear, a person must, of course, have a prescription. In Tennessee, as in most States, a person can obtain a prescription only from a state-licensed optometrist or ophthalmologist after an eye examination. App., *infra*, 27a; C.A.J.A. 837-838, 852.

Tennessee, however, is one of a minority of States that also affords in-state businesses owned by such prescribers a significant competitive advantage in the sale of prescription eyewear. Although the sale of prescription eyewear does not constitute the provision of health care under Tennessee law, App., *infra*, 101a n.8, the state statute, § 63-8-113(c)(6), as interpreted by the Tennessee Supreme Court on certified question in this case, nonetheless allows these prescribers, and only these prescribers, to sell prescription eyewear at retail at the same location where eye examinations and prescriptions are available. App., *infra*, 101a-102a. In this way, Tennessee provides an exclusive advantage to these in-state retailers at the expense of all of their out-of-state

[1] Because the district court entered summary judgment for respondents on petitioners' Commerce Clause claim, the material facts discussed in this petition are drawn from the documentary evidence submitted by the parties in the district court with "all justifiable inferences" drawn in favor of petitioners, who were the non-movants. *Groh v. Ramirez*, 124 S. Ct. 1284, 1293 (2004). Some of the information developed in the district court is subject to a protective order because it involves trade secrets or proprietary business or financial information. Therefore, several volumes of the joint appendix filed in the court of appeals were filed under seal. This petition cites some of those materials, but does not disclose any of the protected information.

competitors who cannot sell eyewear at the same location where eye examinations and prescriptions are available.

b. Most optometrists in Tennessee take advantage of their unique opportunity under state law to operate retail prescription eyewear businesses in the same location where the optometrist performs eye examinations and issues prescriptions. C.A.J.A. 233. They hire retail employees to sell the eyewear. Those employees are not required by state law to have any special training or certification. These retail sales can account for between 40% and 60% of optometrists' revenues. App., *infra*, 35a.

By selling prescription eyewear at retail in the same location where eye examinations and prescriptions are available, Tennessee optometrist-owned businesses offer consumers "one-stop shopping." The record in this case demonstrates that consumers place a very high value on the convenience of one-stop shopping for prescription eyewear. App., *infra*, 26a-27a; C.A.J.A. 853-855.

Tennessee optometrists specifically structure their businesses to take advantage of their unique ability under state law to provide one-stop shopping. By doing so, Tennessee optometrists succeed in making retail sales of prescription eyewear to 77% to 87% of their eye examination patients who require such eyewear. C.A.J.A. 853. Tennessee optometrists design the physical layout of their businesses to facilitate the flow of a patient from the optometrist's examination room to the retail eyewear sales area. App., *infra*, 36a. During the eye examination itself, optometrists engage in selling techniques aimed at retaining their eye examination patients as customers in their retail eyewear business. For example, they recommend specific types of retail eyewear products, such as special lenses or coatings. *Ibid.* Following their examinations and prescriptions, the optometrists employ a variety of techniques to "hand off" their eye examination patients to their retail sales employees. *Ibid.* Some Tennessee optometrist-owned businesses provide their employees (including other optometrists) with commissions

or salaries based on the volume of sales of prescription eyewear. *Ibid.*

c. Respondents do not contest that the state law prohibition against others offering one-stop shopping for prescription eyewear places out-of-state retailers at a significant competitive disadvantage. In many other States, out-of-state retailers of prescription eyewear can offer one-stop shopping, and thus compete on a level playing field. They do so by entering into separate agreements – such as leases or licenses – with state-licensed optometrists, who then locate their optometry practices in a discrete section of the retailers' stores. App., *infra*, 25a; C.A.J.A. 890-891, 895, 897-898. In those States, one-stop shopping is thus available whether a consumer is purchasing prescription eyewear from the retail business of an in-state optometrist or the retail business of an out-of-state company.

In Tennessee, however, the prohibition on out-of-state businesses offering one-stop shopping for retail prescription eyewear prevents them from competing on a level playing field. Without the ability to lease space in their stores to state-licensed optometrists, out-of-state retail prescription eyewear businesses necessarily operate in Tennessee at a significant competitive disadvantage compared to their primary competitors, *i.e.*, optometrist-owned retail eyewear businesses.[2]

As a consequence of the significant competitive disadvantage imposed on all out-of-state retail eyewear businesses, some of those businesses do not enter the Tennessee market at all, concluding it is not feasible for them to do so. App., *infra*, 27a-28a. Those that are present

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[2] Nationwide, approximately 30% of sales in the retail prescription eyewear market are by in-state optometrist-owned businesses, and 40% are by interstate businesses such as petitioners. App., *infra*, 22a. The remaining sales of prescription eyewear are by businesses owned by in-state opticians (about 14%), by in-state ophthalmologists (about 12%) and by HMOs (about 3%). *Ibid.*

in the State have higher costs and lower revenues than they do elsewhere. *Id.* at 28a-29a.

Tennessee's law not only disfavors out-of-state businesses; it also harms consumers. Interstate optical retailers tend to locate in convenient commercial locations such as shopping centers, to be open on evenings and weekends, and to provide wider selections of eyewear. *Id.* at 29a. Interstate prescription eyewear businesses also foster the spread of beneficial innovations such as the production of prescription eyewear within a day or even in as little as an hour, and health-conscious technologies such as ultraviolet lens coatings. C.A.J.A. 258-259.

Interstate prescription eyewear retailers quickly became the primary competitors of in-state optometrist-owned retail eyewear businesses both nationally and in Tennessee. The record evidence in this case, including findings by the Federal Trade Commission, establishes that in States where out-of-state prescription eyewear retailers are permitted to compete effectively, their presence forces optometrists to lower their prices. App., *infra*, 28a-29a; C.A.J.A. 914-915. The exclusion of out-of-state prescription eyewear retailers, by contrast, raises the prices that consumers must pay without increasing quality, and discourages consumers from obtaining needed eye care due to cost and inconvenience. App., *infra*, 28a-29a.

2. Proceedings Below

a. Petitioners LensCrafters, Inc., U.S. Vision, and Cole Vision Corporation are all businesses from outside of Tennessee that sell prescription eyewear at retail in Tennessee in direct competition with the in-state optometrist-owned retail eyewear businesses. Petitioner the National Association of Optometrists and Opticians is a nationwide membership organization composed of interstate eyewear retailers.

Petitioners brought the instant suit in the United States District Court for the Middle District of Tennessee

against the Governor of Tennessee and the members of the Tennessee State Optometry Board, in their official capacities, alleging that Tenn. Code Ann. § 63-8-113(c)(6) is unconstitutional because it violates, *inter alia*, the Commerce Clause. Petitioners argued that the Tennessee law has the purpose and effect of favoring in-state retail sellers of prescription eyewear at the expense of all out-of-state competitors and that such discrimination is without sufficient state justification under the Commerce Clause because any legitimate state interests can be achieved in a manner that does not discriminate against all out-of-state competitors.

The district court certified a question on the scope of the challenged state law to the Tennessee Supreme Court. In that proceeding, the Tennessee Attorney General, then representing respondents, declined to defend the position of the Tennessee State Optometry Board that the challenged state law bars retailers such as petitioner LensCrafters from leasing space in their stores to state-licensed optometrists. Instead, the Attorney General took the position that the state statute prohibited optometrists only from practicing in department stores but did not prohibit them from practicing in stand-alone optical stores. App., *infra*, 42a n.12, 43a-44a. The Tennessee Supreme Court, however, rejected the State's argument and held that the statute's prohibition applies to all retail prescription eyewear businesses, other than those owned by state-licensed professionals. *Id.* at 100a-102a.

When the case returned to federal district court, the Tennessee Attorney General transferred responsibility for handling the litigation of the case to private counsel. *Id.* at 43a n.13. At about the same time, the Tennessee Governor was dismissed from the suit because he is not responsible for enforcing the statute, and the Commissioner of the Tennessee Department of Health was added as a defendant. *Ibid.* Private counsel now represents the Commissioner and the six members of the Tennessee State Optometry

Board, and all the Board Members (except for the one consumer member) are in-state optometrists operating retail prescription eyewear businesses in competition with petitioners. *Id.* at 20a-21a & n.4.

b. Both petitioners and respondents moved for summary judgment in federal district court. Petitioners submitted evidence on discriminatory purpose, showing that the state statute had been enacted at the behest of Tennessee optometrists to protect themselves from competition, including from out-of-state competitors. C.A.J.A. 936-950. For example, an attempt to include a broad grandfather clause in the statute was defeated, after legislators adjourned to consult with the Tennessee State Optometric Association, because such a clause "would permit Sears & Roebuck & Co., Woolworth, Kresge's or other large establishments of this sort to perpetuate the department of optometry in their store." App, *infra*, 25a; C.A.J.A. 949-950.

Petitioners submitted evidence on discriminatory effect, showing that in-state optometrist-owned retail eyewear businesses and out-of-state retail eyewear businesses compete for the same retail consumers, that the inability to offer one-stop shopping puts all out-of-state eyewear retailers at a significant competitive disadvantage, and that the challenged state law thus has an adverse differential economic impact on out-of-state retail eyewear businesses. C.A.J.A. 845-859. Petitioners also submitted evidence that the reduction in competition caused by the state law has a harmful effect on consumers. *Id.* at 914-915, 929-935.

Respondents contended that the Tennessee statute does not discriminate between in-state and out-of-state entities, but rather between optometrists and retail prescription eyewear businesses. Respondents also offered evidence purporting to call into question the sales practices of optometrists in petitioners' stores, but the uncontested evidence demonstrated that the same practices are used by in-state optometrist-owned retail

eyewear businesses. App., *infra*, 35a-37a. Respondents did not challenge the evidence establishing that in-state optometrist-owned businesses take full advantage of their ability to sell eyewear at retail in the same location where examinations and prescriptions are available in order to keep their eye-examination patients as retail eyewear customers. Respondents offered no evidence that any concern by the State about particular sales practices could not be addressed by nondiscriminatory state regulations that treat all retailers of prescription eyewear alike.

c. The district court granted summary judgment to respondents. App., *infra*, 17a-84a. The court held that the Tennessee statute does not violate the Commerce Clause. The court held there was no discriminatory purpose, despite evidence showing that the statute was enacted at the behest of the trade association for the Tennessee optometrists and that the statute was intended to provide a competitive advantage to Tennessee optometrists who offer prescription eyewear for sale. *Id.* at 63a-64a, 87a-89a.

The district court rejected petitioners' argument that out-of-state prescription eyewear retailers and in-state optometrist-owned retail prescription eyewear businesses "must be treated as similarly situated" because they "compete for the same customers." *Id.* at 70a. The court stated that "there may be valid reasons" for allowing only Tennessee licensed optometrists to sell prescription eyewear at the same location where eye examinations and prescriptions are available. *Ibid.* The court concluded that the statute does not have a discriminatory effect because "the similarly situated entities" are the "optical stores owned by in-state interests and optical stores owned by out-of-state interests" and the statute "applies equally to these two entities" regardless of whether the optical store is owned by a Tennessee resident. *Id.* at 67a. Furthermore, the district court found that there is no discrimination among optometrists who wish to sell prescription eyewear because a Tennessee licensed optometrist can reside in any State. *Id.* at 67a n.20. Because the district court held that petitioners are

not similarly situated to in-state optometrist-owned retail businesses, the court declined to address whether the statute discriminates between those competitors or whether "the statute is the least discriminatory measure available to serve the purposes of the statute." *Id.* at 71a.

The district court also rejected petitioners' argument that the statute imposes an undue or excessive burden on interstate commerce and thus violates the Commerce Clause under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). App., *infra*, 71a-84a. The court acknowledged that the record evidence demonstrated that the restrictions imposed by state law cause petitioners to incur additional costs for capital and operations, and account for at least "a portion" of the reduced gross revenues earned by petitioners in Tennessee. *Id.* at 74a. The court held, however, that the totality of these burdens is irrelevant to the *Pike* balancing because "these same costs are imposed upon any optical store [not owned by a Tennessee optometrist] wishing to operate in the state of Tennessee, whether it is owned by an in-state or an out-of-state interest." *Id.* at 72a. Similarly, the reduced revenues of out-of-state prescription eyewear retailers are irrelevant in the view of the district court because "it may be" that in-state optometrist-owned retail businesses do not benefit from the revenues lost by the out-of-state retailers. *Id.* at 74a.

d. The court of appeals affirmed. App., *infra*, 1a-16a. The court concluded that "dispensing optometrists and optical stores are not similarly situated" for purposes of the Commerce Clause. *Id.* at 11a. The court stated that there are "obvious differences" between petitioners and optometrists, who "are healthcare providers and, as such, have unique responsibilities and obligations to their patients that are not shared by optometric stores." *Ibid.* The court nowhere inquired whether out-of-state retail eyewear businesses and in-state optometrist-owned retail eyewear businesses compete against one another in the same market.

The court of appeals reasoned that there is no discrimination because the state law prohibits both in-state and out-of-state retail eyewear businesses not owned by an optometrist "from leasing space to optometrists." *Id.* at 12a. The court also reasoned that there is no discrimination because "out-of-state optometrists are given the same opportunity to obtain a license to practice optometry and to sell eyewear incident to their practice." *Ibid.*

Finally, the court of appeals adopted the district court's reasoning that petitioners failed to show a violation of the Commerce Clause under the balancing test articulated in *Pike*. App., *infra*, 13a-14a.

The court of appeals denied a petition for rehearing and rehearing *en banc* filed by petitioners. *Id.* at 104a-105a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit erroneously rejected a Commerce Clause challenge to a state law that imposes a significant competitive disadvantage on all out-of-state businesses to the exclusive benefit of their primary in-state competitors. The court ignored the direct competition between the businesses and concluded that they are not similarly situated to one another for purposes of the Commerce Clause, contrary to this Court's precedent and to one side of a broadening conflict among the circuits. The decision below also conflicts with decisions of this Court and other circuits on the test for discrimination as well as on the *Pike* undue burden test under the Commerce Clause.

Review by this Court is especially warranted because the test adopted by several circuits, now including the Sixth Circuit, often disadvantages out-of-state firms that adopt innovative, economically efficient and consumer-friendly

means of doing business and challenge their more traditional in-state competitors. Examples include petitioners – who brought a new approach to nationwide eyewear retailing – as well as 1-800 retailers, Internet businesses, and the like, which use new technology to provide benefits that consumers prefer. The very fact of innovation makes these out-of-state businesses look superficially different from their more traditional, in-state competitors that benefit from protectionist state laws. The Sixth Circuit and some of the other circuits rely on these superficial distinctions to pretermit Commerce Clause analysis in such situations. But other circuits correctly recognize that the existence of direct competition means that businesses are similarly situated for purposes of the Commerce Clause. Those courts see the challenged laws for what they are, as the very sort of state protectionism that the Commerce Clause prohibits.

This Court's resolution of the conflict is critical to the ongoing vitality of the Commerce Clause, whose purpose is to ensure the free flow of interstate commerce, including the ability of innovative businesses to compete in the nationwide market unimpeded by discriminatory state statutes that protect more traditional, local competitors.

I. The Court Of Appeals' Ruling Exacerbates Division In The Circuits And Is Contrary To This Court's Test For Impermissible Discrimination Under The Commerce Clause

A state statute impermissibly discriminates against interstate commerce when it authorizes differential treatment of "similarly situated" in-state and out-of-state businesses, *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997), and that differential treatment "benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Env'tl Quality*, 511 U.S. 93, 99 (1994). If discrimination is found under the Commerce Clause, the

defender of the statute must prove that the discrimination is justified, *i.e.*, that it furthers legitimate governmental interests that cannot be served by reasonable nondiscriminatory alternatives. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).[3] The court below disregarded these directives from this Court and parted ways with other circuits on the "similarly situated" analysis as well as on the ultimate test for discrimination.

A. The Decision Below Conflicts With The "Similarly Situated" Inquiry Required By This Court And Broadens A Split In The Circuits

1. The court relied on superficial distinctions to rule that businesses were not "similarly situated," rather than holding that competition between businesses requires a contrary ruling under *Tracy*, as recognized by other lower courts

a. This Court's "similarly situated" analysis is rooted in the "fundamental objective" of the Commerce Clause to preserve "a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). In most Commerce Clause cases, it can be taken for granted that the in-state

[3] A court's finding "that state legislation constitutes 'economic protectionism'" in violation of the Commerce Clause "may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imps. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted). The courts below rejected petitioners' argument that the challenged state law was discriminatory in both purpose and effect based on essentially the same erroneous legal rulings. If this Court were to reverse the court of appeals' erroneous legal rulings addressed in this petition, the lower courts would need to revisit their holdings on both discriminatory purpose and effect.

and out-of-state businesses compete against each other in the same market and, thus, are similarly situated. *Ibid.* But, "when the allegedly competing entities provide different products" or services then "there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Ibid.* This is because the difference "may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burdens were removed." *Ibid.*

This Court therefore made clear in *Tracy* that the "similarly situated" inquiry is resolved by asking whether there is "actual or prospective competition" in a single market between the "supposedly favored and disfavored entities." *Tracy*, 519 U.S. at 300.

The Sixth Circuit failed to apply the *Tracy* test of "actual or prospective competition," however, relying instead on superficial distinctions between direct competitors to preclude a finding of similarly situated. The Sixth Circuit concluded that Tennessee optometrists and petitioners like LensCrafters are not similarly situated because "they provide different services to the market," App., *infra*, 11a, meaning, apparently, that Tennessee optometrists conduct eye examinations and issue prescriptions and petitioners by law cannot.

But the market at issue here – the one in which Tennessee's law is protectionist – is the retail prescription eyewear market. *Id.* at 10a. The undisputed record demonstrates that there *is* actual competition in that market between petitioners and in-state optometrist-owned retail prescription eyewear businesses. It also shows that there would be greater prospective competition if state law did not make one-stop shopping the exclusive domain of the in-state competitors.

What the Sixth Circuit refused to acknowledge is that Tennessee optometrists are authorized by state law to wear two hats: they may conduct eye examinations and issue prescriptions, and they also may compete in that retail market by engaging in the business of selling

prescription eyewear. The Tennessee Supreme Court unequivocally held that such retail sale of prescription eyewear is *not* the provision of healthcare under Tennessee law. *Id.* at 101a n.8. Those optometrist-owned retail businesses are commercial enterprises and they are petitioners' primary competitors in the retail prescription eyewear market. The Sixth Circuit wholly disregarded the relevance of this competition to the "similarly situated" inquiry in contravention of *Tracy*.

The Sixth Circuit's reference to "different services to the market" was an evident attempt to echo language in *Tracy*, but its accompanying analysis is not true to that precedent. By focusing on the different services provided by optometrists *as health care providers*, the Sixth Circuit ignored the record fact that optometrists *as retailers* provide the exact same services as petitioners. With regard to the retail prescription eyewear market, the fact that one retailer is a Tennessee optometrist and the other is an out-of-state business is a distinction without a difference so far as whether they are similarly situated for purposes of the Commerce Clause.

The Court made clear long ago that a superficial distinction between businesses or products does not determine whether businesses are similarly situated for Commerce Clause purposes. In *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), upon which *Tracy* chiefly relied, the Court found that businesses that provided different services, *i.e.*, shipment of salmon in freezer ships for later canning on the one hand and interstate shipment of canned salmon on the other, nonetheless were similarly situated because they competed against each other in the same market. *Tracy*, 519 U.S. at 300-301 (citing *Arctic Maid*, 366 U.S. at 204).

Similarly, in *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), the Court was presented with a Hawaii tax on alcoholic beverages that exempted in-state produced "okolehao and pineapple wine." *Id.* at 268. Turning aside the State's arguments that these unique in-state products "pose no competitive threat to other liquors produced

elsewhere and consumed in Hawaii," the Court indicated that it would not rest its analysis on superficial distinctions between products. *Id.* at 269 (citation omitted). Rather, there would have to be a finding of "no competition whatsoever between locally produced products and out-of-state products," *i.e.*, other alcoholic beverages, in order for the products not to be similarly situated. *Id.* at 269 & n.10. The Court found that there was competition and ultimately held that the state tax unlawfully discriminated in violation of the Commerce Clause.

Tracy presented the opposite scenario where the businesses appeared alike, but the Court concluded that they were not similarly situated for Commerce Clause purposes because they were not competitors. In *Tracy*, the in-state businesses appeared to be superficially the same as the out-of-state businesses because both sold gas. This Court's application of its "actual or prospective competition" test, however, demonstrated that the services at issue, *i.e.*, the sale of bundled gas on the one hand and the sale of unbundled gas on the other, were not similarly situated because they were sold in distinct markets and did not compete against one another. 519 U.S. at 310.

The Sixth Circuit erred in failing to apply *Tracy*, *Arctic Maid*, and *Bacchus* correctly. That failure ensured that the Tennessee statute was not subjected to the heightened scrutiny required by this Court to ferret out protectionist legislation disadvantaging out-of-state businesses to the benefit of in-state competitors. This approach is harmful to interstate markets and will, in the end, injure consumers who benefit from interstate competition, as the Federal Trade Commission determined more than 15 years ago. *See* pp. 22-23, *infra*.

b. The Sixth Circuit's erroneous approach places it on one side of a broadening divide among the circuits.

Three circuits properly follow this Court's precedent and look to the fact of competition to determine if in-state businesses protected by a state law are similarly situated to out-of-state businesses challenging the law as unlawful

discrimination in violation of the Commerce Clause. Unlike the Sixth Circuit below, these circuits are not distracted by the fact that the out-of-state competitors may operate their businesses differently or have a different form of ownership.

In *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986), the First Circuit assessed the effect on competition of a Rhode Island law that permitted only Rhode Island licensed attorneys to collect debts. The law was challenged by an out-of-state debt collection agency that wanted to do business in Rhode Island. The First Circuit did not pretermit its Commerce Clause analysis merely because the in-state business was owned by lawyers and the out-of-state business was a nonprofessional commercial firm. The First Circuit struck down the law as a violation of the Commerce Clause because debt collection is a commercial activity that the state law had reserved primarily to its own residents, to the detriment of all out-of-state competitors, without adequate justification. The First Circuit, unlike the Sixth Circuit below, correctly refused to allow a State to reserve to its own licensed professionals the right to engage in commercial activity beyond the proper scope of the state license.

In *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993), the Seventh Circuit struck down as a violation of the Commerce Clause a flat registration fee on any truck used to haul garbage in the State, even though the state law was facially evenhanded as between in-state and out-of-state trucks. With rare exceptions, in-state businesses that hauled garbage used dedicated "garbage trucks" and hauled garbage frequently; whereas out-of-state businesses hauled garbage in regular trucks and did so with less frequency, such that the flat fee imposed a higher proportionate fee on the out-of-state trucks. *Id.* at 1273. The court of appeals rejected the State's argument that the fee's burden was not discriminatory because it affected only the method of operation of trucks, *i.e.*, that

in-state haulers used "garbage trucks" while out-of-state haulers did not. Instead, the court recognized that the different trucking businesses were competitors, and thus similarly situated. It ruled that the State had unlawfully "erected an economic barrier" in effect against out-of-state trucks that sought to compete in the garbage hauling market. *Id.* at 1279.[4]

In *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), the Eighth Circuit agreed with an out-of-state landfill business that a county ordinance discriminated against interstate commerce because it prohibited garbage from being delivered to a landfill and required that garbage be delivered, instead, to a "resource recovery facility" that did not store garbage but converted it into other items. The court invalidated the ordinance because it directed the garbage exclusively to an in-state resource recovery facility to the disadvantage of the out-of-state landfill that wanted to compete for the garbage. The Eighth Circuit rejected the State's argument that the ordinance's differentiation between businesses engaged in garbage storage and those engaged in garbage conversion could somehow eliminate that discrimination. Rather, the court correctly relied on the fact that both were competing in the market of disposing of garbage.[5]

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[4] In *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), this Court upheld against a Commerce Clause challenge a State's flat fee charged to trucks that engage in intrastate commercial hauling because the record in that case did not show that the fee "impose[d] any significant practical burden upon interstate trade" or that the fee "unfairly discriminate[d] against interstate truckers." *Id.* at 2423-2424. That case did not question the underlying premise of the *Government Suppliers* case that different types of trucks competing in the same market were similarly situated and thus appropriate comparators in assessing whether a fee was discriminatory under the Commerce Clause.

[5] The Commerce Clause analysis of various state courts also focuses, consistent with this Court's precedent, on the fact of competition between an out-of-state challenger and the in-state

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By contrast, the Second and Fifth Circuits, like the court below, pretermit the inquiry into whether a state law discriminates against interstate commerce in cases where the in-state and out-of-state businesses are somehow superficially different by ruling that the two are not similarly situated. They fail to focus on whether in-state and out-of-state businesses are competitors in the same market.

The Fifth Circuit in *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), and again in *International Truck and Engine Corp. v. Bray*, 372 F.3d 717 (5th Cir. 2004), upheld a Texas law that prohibited automobile manufacturers (all of which were out-of-state) from obtaining automobile dealer licenses. Those state licenses were required to sell automobiles at retail in the State, including over the Internet as the manufacturers wanted to do. Nowhere in the Fifth Circuit's opinions is there any discussion of competition. Rather, the Fifth Circuit deemed the "similarly situated" interests to be in-state and out-of-state manufacturers. The court then easily (and erroneously) concluded that no discrimination existed because neither in-state automobile manufacturers (of which there were none) nor out-of-state automobile manufacturers were permitted to obtain dealer licenses to sell automobiles. 264 F.3d at 502-503; *see also* 372 F.3d at 726. The out-of-state manufacturers who sought to sell automobiles at retail and the in-state automobile dealers who do just the same were found not "similarly situated" because of their different ownership, without regard to the fact of competition. The Fifth Circuit's decision to uphold a statute that plainly curtailed interstate competition thus rested entirely on the superficial distinction that the entity that was trying to

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business protected by the challenged state law. *See, e.g.*, *Jordan v. California Department of Motor Vehicles*, 75 Cal. App. 4th 449, 462 (1999) (applying *Tracy* competition analysis in assessing whether products are similarly situated); *Smith v. New Hampshire Department of Revenue Admin.*, 813 A.2d 372, 377 (N.H. 2002) (same).

compete in the retail automobile market was a "manufacturer" and not a "dealer."

In *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003), the Second Circuit similarly erred by focusing on superficial distinctions rather than the fact of competition. The court held that an out-of-state distributor of cigarettes, which relied on interstate common carriers to deliver its goods to customers in the State, was not similarly situated to an in-state brick-and-mortar store in that State. Based on that holding, the court ruled that a state law that prohibited cigarette sellers from shipping cigarettes directly to New York consumers through common carriers did not discriminate against interstate commerce despite the fact that, as a practical matter, only in-state brick-and-mortar stores could take advantage of an exception that permitted cigarette sellers to deliver a limited quantity of cigarettes directly to consumers through the seller's own delivery service. The court reasoned that the exception was irrelevant in assessing whether the law discriminated against out-of-state businesses because the in-state counterparts to those businesses were "not New York brick-and-mortar retail outlets that sell cigarettes," but rather, "non-brick-and-mortar sellers who ship cigarettes directly to New York consumers following purchases made by Internet, telephone, or mail order." *Id.* at 215-216. Again, the superficial distinction between in-state "brick-and-mortar stores" and out-of-state direct shippers resolved the case for the court, despite "actual or prospective competition" between them.[6]

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[6] The Second Circuit also suggested that the law's effect of requiring out-of-state direct cigarette shippers "to establish a brick-and-mortar outlet in order to sell retail cigarettes directly to consumers" did not raise Commerce Clause concerns because the out-of-state shippers did not show that it would be harder or more expensive for them to "establish[] a retail outlet in New York" than for in-state direct cigarette shippers to do so. *Id.* at 212-213. That part of the court of appeals' holding has been superseded by this Court's intervening decision in *Granholm v. Heald*, 125 S. Ct. 1885 (2005), which reaffirmed

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The development of this conflicting Commerce Clause jurisprudence frequently eliminates judicial scrutiny of laws that favor in-state businesses over out-of-state competitors. The approach of the Second, Fifth, and, now, Sixth Circuits is particularly troubling because it takes advantage of the fact that successful, expanding competitors often use innovative retailing techniques that make them look superficially different from their more traditional competitors in the same market. Yet, the purpose of the dormant Commerce Clause is precisely to guard interstate competition from protectionist state laws whose purpose is to capture profits for the State's own businesses.

2. The court improperly conflated the question of the governmental justification for a discriminatory law with the "similarly situated" inquiry, and did not require respondents to bear the burden of proof on justification as required by decisions of this Court and lower courts

The Sixth Circuit also failed to analyze properly the "similarly situated" question in this case because it folded into that inquiry the analytically distinct question whether the alleged state law discrimination could be justified by governmental interests.

This Court has held that a governmental justification offered to defend a state law against Commerce Clause challenge does not determine whether the in-state and out-of-state businesses are similarly situated. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), the Court ruled that a State that was attempting to defend its statute against a Commerce

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that a State cannot defeat a Commerce Clause claim simply by permitting out-of-state entities an equal opportunity to establish an in-state presence. *See id.* at 1897.

Clause challenge had not preserved an argument that the law's discrimination was justified by a legitimate governmental interest by merely arguing that the businesses were not similarly situated. The dissent asserted that treating the differences between entities as part of the similarly situated inquiry or as part of justification was "of no consequence." *Id.* at 603 (Scalia, J., dissenting). This Court expressly rejected the view that a governmental justification for discriminating between two entities is relevant to the determination whether the two are similarly situated under *Tracy*. *Id.* at 582 n.16.

Camps Newfound thereby correctly distinguished the threshold inquiry regarding whether the in-state and out-of-state entities compete with one another and thus are similarly situated, from the later inquiry, *i.e.*, whether any demonstrated discriminatory treatment between those similarly situated entities can nonetheless be justified by proof of a governmental interest that cannot be addressed in a non-discriminatory manner.

Disregarding that analytical distinction, the Sixth Circuit observed that optometrists and out-of-state retail prescription eyewear businesses are not similarly situated because the former are "health care providers" and the latter are not, citing the fact that "[u]nlike retail optical stores, licensed optometrists * * * have unique responsibilities and obligations to their patients." App., *infra*, 11a. But that is a difference that does not bear on the question of competition and, thus, not on the question of similarly situated. Rather, "unique responsibilities and obligations to their patients" may be a difference that could justify the state law's otherwise impermissible favoring of retail prescription eyewear businesses owned by Tennessee optometrists, although petitioners dispute that claim, particularly in light of the fact that any Tennessee optometrists to whom they would lease space would have the same professional responsibilities and obligations toward their patients.

Significantly, by conflating governmental justification with the "similarly situated" inquiry, the Sixth Circuit's test relieves defendants in Commerce Clause cases of their burden to prove that the discrimination was justified as a matter of fact, or that any governmental justification could not be pursued in a non-discriminatory way. *See Camps Newfound*, 520 U.S. at 582; *Oregon Waste Sys.*, 511 U.S. at 100-101; *New Energy*, 486 U.S. at 278.

Some of the same circuits that disagree on the relevance of competition to the similarly situated analysis are, not surprisingly, split as well on this question of conflating justification with that analysis. The First Circuit in *National Revenue* correctly considered whether the state law discrimination in favor of in-state attorneys against out-of-state debt collection agencies was justified by the State's interest in ensuring ethical behavior by debt collectors, and concluded that it was not. That court did not rely on the ethical obligations of in-state attorneys to distinguish them as not similarly situated to the debt collection agencies; rather, the court correctly recognized that the fact of prospective competition meant that the businesses were similarly situated. 807 F.2d at 290. By contrast, the Fifth Circuit in *Ford Motor Co.* appears to have conflated the similarly situated and justification inquiries as the Sixth Circuit did in this case. The Fifth Circuit suggested that "the legislature's intent to prevent manufacturers from utilizing their superior market position to compete against dealers in the retail car market" was relevant in assessing whether out-of-state automobile manufacturers that sold cars were similarly situated to in-state dealers that sold cars. 264 F.3d at 500.

The court of appeals' failure in this case to require respondents to produce evidence and prove a governmental justification for discriminating against out-of-state eyewear retailers is particularly pernicious in light of the conclusions of the Federal Trade Commission. The FTC concluded in 1989 that state laws just like the one challenged in this case adversely affect competition and are detrimental to

the public health and welfare. After extensive study of the effect of such state laws on the market for prescription eyewear, the FTC found that the laws "insulate[] local optometrists from competition from large, price-competitive chain firms, most of which operate interstate" and thus "deny[] interstate ophthalmic providers access to local markets when the evidence demonstrates that the states' asserted basis for such actions – to protect citizens from poor-quality ophthalmic care – has no substantial basis in fact." *Ophthalmic Practice Rules*, 54 Fed. Reg. 10,285, 10,298 (1989). The FTC found that a "substantial body of evidence demonstrates that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the overall quality of care provided in the market" without providing "any offsetting quality related benefits to consumers." *Id.* at 10,286; *see also id.* at 10,298 ("The primary effect of [these commercial practice restrictions] is to protect one category of providers, primarily solo practitioners, from competition from high-volume chain firms – at an annual cost to consumers of millions of dollars.").[7]

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[7] The FTC's final rule that followed this study was invalidated based on a judicial finding that Congress had not unambiguously authorized the agency to exercise authority over States as sovereigns. *See California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990). That ruling did not question the FTC's underlying study. Indeed, the continued litigation of the instant case evidences the strong economic interest on the part of Tennessee optometrists to defend the challenged law. The Tennessee Attorney General earlier suggested in proceedings that the law raises substantial constitutional questions and urged a narrow reading that would have permitted petitioners to lease space in their stores to optometrists. App., *infra*, 43a-44a. After the state court rejected that interpretation, responsibility for handling this litigation was transferred to private counsel, who now represents the respondents. *Id.* at 43a n.13. The Tennessee State Optometry Board is apparently paying for legal fees through increased assessments on all Tennessee optometrists. *See* Tenn. Bd. of Optometry, Minutes of Feb. 11, 2004, at 3, *available at* www2.state.tn.us/health/Downloads/g3024132.pdf.

B. The Decision Below Upholds A Discriminatory Law That Disadvantages All Interstate Competitors, Contrary To *Exxon*, And That Conditions Participation In A Nonprofessional Commercial Market On Becoming An In-State Licensed Professional, Contrary To *Granholm*

The Sixth Circuit also concluded that Tennessee law does not discriminate against interstate commerce. It did so by invoking hypothetical out-of-state businesses, operated by "out-of-state optometrists," that could legally offer one-stop shopping in Tennessee. The court declared that "out-of-state optometrists are given the same opportunity to obtain a license to practice optometry and to sell eyewear incident to their practice." App., *infra*, 12a. That conclusion is not supported by the factual record and conflicts with this Court's decisions in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and *Granholm v. Heald*, 125 S. Ct. 1885 (2005).

In *Exxon* this Court stated – in language quoted by the Sixth Circuit – that "[t]he fact that the burden of a state regulation falls on *some* interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." 437 U.S. at 126 (emphasis added). The critical facts in *Exxon*, based on a practical and fact-oriented examination of the relevant competitive market, were that there were other out-of-state firms that could (and did) compete on a level playing field with in-state firms, and did not face any state-imposed barriers to entry "whatsoever." *Id.* at 125-127. The challenged state law thus did not impermissibly discriminate against interstate competition.[8]

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[8] Language in *Exxon* has been read out of context by some courts to establish a general rule that laws that burden exclusively out-of-state businesses are not necessarily discriminatory in effect. *See Ford Motor Co.*, 264 F.3d at 501-502. To the extent this Court's holding in *Exxon* was, in fact, broader than the rule discussed above in the text and has

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Here, however, the Sixth Circuit only hypothesized "out-of-state optometrists" who, in the court's view, could readily enter the Tennessee retail prescription eyewear market to offer one-stop shopping in competition with the retail prescription eyewear businesses already operated by Tennessee optometrists. The court did not engage in the careful scrutiny of the market required by *Exxon* to ascertain the actual existence of out-of-state competitors. *See* 437 U.S. at 126 n.15. Had the court done so, it is clear that the record could not support its conclusion.

Further, unlike in *Exxon*, here there are plain barriers facing the Sixth Circuit's hypothesized competitors. Certainly, when a state law imposes on out-of-state businesses significant barriers to competing on an even footing with the favored in-state entities (such as qualifying and becoming licensed by Tennessee to practice optometry within that State even though the retail sale of prescription eyewear does not constitute the provision of health care under Tennessee law) it is rank formalism to claim that the state law does not discriminate against interstate commerce in its practical effect.[9]

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not been clarified or confined by subsequent Commerce Clause cases, it may, in the appropriate case, need to be overruled. *See Ford Motor Co.*, 264 F.3d at 512 (E. Jones, J., concurring specially) ("*Exxon* seems woefully out of step with the Court's more recent cases. * * * It should be obvious that the flow of interstate goods is diminished when barriers to entry totally prevent fair competition by a class of potential distributors: the favored local distributors' price and service incentives become less keenly competitive, prices rise, and overall sales will decline from the free-market equilibrium point.").

[9] The decision below also is in conflict with the First Circuit's decision in *National Revenue*, which held that a Rhode Island law that permitted only Rhode Island licensed attorneys to collect debts discriminated in violation of the Commerce Clause. The First Circuit properly concluded that even though any qualified person could, hypothetically, become admitted to the Bar of Rhode Island, by "limiting this practice to members of the Rhode Island bar, Rhode Island effectively bars out-of-staters from offering a commercial service within its borders and confers the right to provide that service – and to reap the associated

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The Sixth Circuit's failure to analyze, or even to acknowledge, the barriers to even-handed competition also conflicts with this Court's recent decision in *Granholm v. Heald*, 125 S. Ct. 1885 (2005). There, the Court held that a State's "in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* at 1897 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)). Indeed, the lower court's very notion of an "out-of-state optometrist" competing in Tennessee is a misnomer. Although optometrists residing in any State are eligible to apply to become licensed in Tennessee, and thus offer one-stop shopping there, that person must, in effect, become a *Tennessee* optometrist. Indeed, the court of appeals' need to invoke hypothetical out-of-state optometrists who could effectively become in-state optometrists without any basis in the record contradicts this Court's pragmatic understanding in *Granholm* that the absence of such persons simply confirms the discriminatory effect of the state law. *See* 125 S. Ct. at 1896 ("It comes as no surprise that not a single out-of-state winery has availed itself of New York's direct-shipping privilege.").[10]

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economic benefit – upon a class largely composed of Rhode Island citizens." 807 F.2d at 290; *see also Walgreen Co. v. Rullan*, 405 F.3d 50, 56 (1st Cir. 2005) (holding that "costly and time-consuming administrative and judicial procedures established" by a Puerto Rico law for licensing new pharmacies that "has limited competition in favor of the predominantly local group of existing pharmacies" violated Commerce Clause), *pet. for cert. filed* (Nov. 4, 2005) (No. 05-585).

[10] There are portions of the Sixth Circuit's opinion, in both its discussion of discriminatory purpose and discriminatory effects, that suggest there could be no finding of discrimination because *some* in-state entities are burdened by the Tennessee law in similar manner as petitioners (*i.e.*, in-state retail eyewear businesses other than those run by optometrists), despite the fact that petitioners' primary in-state competitors are exclusively favored by the challenged statute. App., *infra*, 8a-9a, 12a. To the extent that the Sixth Circuit so held, that holding conflicts with this Court's long-standing admonition that a law

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II. The Court Of Appeals' Interpretation Of The Undue Burden Test Under *Pike* Adds To A Circuit Split Regarding Which Burdens On Interstate Commerce Are Relevant To That Test

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court held that, even if a state law does not discriminate against interstate commerce in any of the ways that trigger the strictest scrutiny discussed above, *e.g.*, purposefully or in effect, the law is nonetheless unconstitutional if "the burden imposed" on interstate commerce "is clearly excessive in relation to the putative local benefits," even if "its effects on interstate commerce are only incidental.'" *Id.* at 142. That *Pike* balancing test "indicate[s] that even nondiscriminatory state legislation may be invalid under the dormant Commerce Clause." *Tracy*, 519 U.S. at 298 n.12. Thus, this Court has "invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests," because the laws nonetheless placed burdens on interstate commerce that were excessive in relation to any local benefit. *Ibid.*

The Sixth Circuit's application of the *Pike* test through its adoption of the district court reasoning in the

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is "no less discriminatory because in-state or in-town processors are also covered by the prohibition." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *accord Bacchus Imps. v. Dias*, 468 U.S. 263, 270 (1984); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951). Such a ruling creates a conflict in the circuits. Both the First and Third Circuits correctly hold that disfavoring *some* in-state entities does not eliminate the fact of discrimination as *Carbone* teaches. *See, e.g., Walgreen*, 405 F.3d at 58; *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Bd.*, 298 F.3d 201, 213 (3d Cir. 2002) ("if the wholesale price floors protect incumbent in-state dealers not only from out-of-state competitors, but also from in-state ones (as the District Court conjectured), that simply exacerbates their protectionist effect").

instant case adds to a circuit split regarding the burdens that are relevant to that test. The courts below held that the burdens of the increased costs on out-of-state prescription eyewear businesses and of the reduced gross revenues earned by such businesses in Tennessee are not relevant to the *Pike* balancing because those costs are not unique to interstate firms wishing to do business in Tennessee. Rather, "these same costs are imposed upon any optical store wishing to operate in the state of Tennessee, whether it is owned by an in-state or an out-of-state interest." App., *infra*, 72a; *id.* at 12a. The Sixth Circuit thus applies the same analysis as several other circuits that only the burdens from a state statute that fall more heavily on interstate, as opposed to intrastate, commerce are relevant to the determination of whether a statute imposes impermissible burdens on interstate commerce, whereas at least two other circuits take into account all burdens on interstate commerce imposed by the challenged law.

The Eighth and Tenth Circuits follow a rule different than the Sixth Circuit and have held, correctly in petitioners' view, that all burdens on interstate commerce imposed by the challenged state law are relevant to the *Pike* balancing test under the Commerce Clause.

In *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), the Eighth Circuit held that a facially neutral Missouri law requiring propane distributors to have storage tanks located within the State violated *Pike* balancing. After explaining that there were propane distributors located both inside and outside Missouri, the court held that it was required to "look at the cumulative effects of the Missouri statute on all propane distributors." *Id.* at 736. The court found that the financial burden on the propane distributors – $35,000 to $60,000 per distributor to build a storage tank – was not inconsequential and it struck down the law because the burden on interstate commerce exceeded the *de minimis* putative local benefits of reducing propane shortages in winter.

The Tenth Circuit, for its part, in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), expressly rejected the approach adopted here by the Sixth Circuit. The district court had held that a Wyoming law, which prohibited importing live big game animals into the State, did not violate *Pike* despite the extensive interstate market in big game animals that was shut out of Wyoming because of the law. The State had argued that, "when a statute regulates evenhandedly, the extent of the burden the statute imposes on interstate commerce is irrelevant; the only inquiry [under *Pike*] is whether the statute imposes a different burden on interstate commerce than it does on intrastate commerce." *Id.* at 765. The Tenth Circuit explicitly disagreed, holding the State's argument was "not only circular, but it completely misstate[d] the *Pike* analysis." *Ibid.* The court explained that "[b]y definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce." *Ibid.* Therefore, adoption of the State's understanding in that case would have meant that *Pike* has no application. The Tenth Circuit found that "the Supreme Court has made clear that the extent of the burden on interstate commerce is a key inquiry under the *Pike* analysis," *ibid.*, and reversed and remanded the case for further proceedings.

The Second, Third, Fifth, and Seventh Circuits, by contrast, take an approach akin to the courts below and hold that only burdens that fall more heavily on interstate commerce than in-state commerce are cognizable under *Pike*.

The Second Circuit, in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2004), held that the absence of a disparate impact between the burden on interstate commerce and the burden on intrastate commerce is sufficient to defeat a claim under *Pike*. The Third Circuit has adopted a similar view, holding that "the only incidental burdens on interstate commerce that implicate the commerce clause . . . are those that discriminate against interstate commerce." *Instructional Sys., Inc. v.*

Computer Curriculum Corp., 35 F.3d 813, 826 (3d Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). Likewise, in *National Solid Waste Management Association v. Pine Belt Regional Solid Waste Management Authority*, 389 F.2d 491 (5th Cir. 2004), the Fifth Circuit held that the relevant burdens for *Pike* balancing are those burdens on interstate commerce that exceed the burdens on intrastate commerce. And the Seventh Circuit has held that "the analysis under the balancing procedure of *Pike*" applies "only when the laws create a differential burden on interstate commerce." *K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir. 1992).

This reasoning robs the *Pike* test of its utility. *Pike* applies only in instances where a statute is not struck down as impermissibly discriminatory. *See Tracy*, 519 U.S. at 298 n.12. But to hold that the only burdens that count under *Pike* are those that result from discriminatory treatment of firms doing business in interstate commerce is to say that *Pike* applies only in cases where a statute already has been struck down as impermissibly discriminatory and the *Pike* analysis is not relevant.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Plaintiffs-Appellants,

v. No. 03-5512

KENNETH S. ROBINSON, in his official capacity as Commissioner of the Tennessee Department of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. Nos. 98-00150; 00-00096 – Aleta A. Trauger, District Judge.

Argued: November 2, 2004

Decided and Filed: April 14, 2005

Before: MARTIN and BATCHELDER, Circuit Judges; JORDAN, Senior District Judge.*

COUNSEL

ARGUED: Barry Friedman, NEW YORK UNIVERSITY LAW SCHOOL, New York, New York, for Appellants. Eugene N. Bulso, Jr., BOULT, CUMMINGS, CONNERS & BERRY, Nashville, Tennessee, for Appellees. **ON BRIEF:** Barry Friedman, NEW YORK UNIVERSITY LAW SCHOOL, New York, New York, Julie A. Maloney, Stacey L. Jarrell, THORP, REED & ARMSTRONG, Pittsburgh, Pennsylvania, Daniel H. Bromberg, JONES DAY, Washington, D.C., Alan N. Greenspan, JACKSON WALKER, L.L.P., Dallas, Texas, for Appellants. Eugene N. Bulso, Jr., Melissa R. Ballengee, Barbara Hawley Smith, BOULT, CUMMINGS, CONNERS & BERRY, Nashville, Tennessee, for Appellees. Roger A. Fairfax, Alissa Starzak, O'MELVENY & MYERS, Washington, D.C., for Amicus Curiae.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Lenscrafters, along with several other interstate optical companies and their national trade association, appeal the district court's summary judgment upholding the constitutionality of a Tennessee state statute, Tenn. Code Ann. § 63-8-113(c)(6),

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* The Honorable R. Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designation.

which, as interpreted by the Tennessee Supreme Court, essentially prohibits optical companies from leasing space to optometrists to perform eye exams in their retail eyewear stores. On appeal, Lenscrafters claims that the provision violates the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution. For the following reasons, we AFFIRM the summary judgment of the district court.

I.

On April 17, 1967, Tennessee Code Annotated Section 63-8-113(c)(6) was signed into law. This provision, the constitutionality of which is at issue in this case, provides that it is unlawful for any licensed optometrist to "[p]ractice or offer to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." At the time that the law was passed, proponents argued that the prohibition was necessary to "upgrade the profession" and to protect the doctor-patient relationship from interference by commercial interests. Kenneth Robinson, in his capacity as Commissioner of the Tennessee Department of Health and henceforth referred to as the State, claims that the law was enacted to prevent the harm that may occur if optometrists are subjected to the control of optical retail stores.

The plaintiffs in this case, collectively referred to as "Lenscrafters," argue that the statute was passed as a protectionist measure, aimed at preventing large out-of-state retail stores from competing with local optometrists in the retail eyewear market. To support its claim, they point to Tennessee Optometric Association documents that

seemingly refer to a "top secret" campaign to rid Tennessee of commercialism in discount optometric stores. Lenscrafters also claims that the legislative history of the law suggests that the provision had discriminatory purposes since at least some members of the Tennessee legislature criticized the bill at the time of its passage as lacking any public purpose.

Lenscrafters generally prefers to provide "one-stop shopping," whereby it leases space in its retail eyewear superstores to optometrists who perform eye exams. Section 63-8-113(c)(6), as interpreted by the Tennessee Supreme Court, essentially outlaws this practice. *See Lenscrafters, Inc. v. Sundquist*, 33 S.W.3d 772 (Tenn. 2000) (holding that Section 63-8-113(c)(6) applies to businesses, such as Lenscrafters, that primarily sell ophthalmic materials). Consequently, Lenscrafters claims that Section 63-8-113(c)(6) violates the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution because it allows in-state optometrists to provide "one-stop shopping" while prohibiting optical companies from doing the same.

II.

Lenscrafters filed the original action challenging Section 63-8-113(c)(6) on February 19, 1998, in the District Court for the Middle District of Tennessee. On August 3, 1999, the district court certified a question to the Tennessee Supreme Court, seeking an interpretation of whether an entity engaged primarily in the business of selling lenses and frames is a "retail store or other commercial establishment" under Section 63-8-13(c)(6). The Tennessee Supreme Court, in an opinion entered on December 13,

2000, held that such establishments did fall within Section 63-8-113(c)(6)'s prohibition. *See Sundquist*, 33 S.W.3d at 778. In its opinion, the court noted that the statute applies only to "non-health care profession commercial entities," suggesting that optometrists are allowed to sell lenses and frames within their own practice. *Id.* (internal quotation marks omitted).

On January 15, 2003, the district court denied Lenscrafters's motion for summary judgment and granted the State's motion for summary judgment, holding that Section 63-8-113(c)(6) does not violate the Commerce Clause, the Equal Protection Clause, or the Due Process Clause. The court rejected Lenscrafters's Equal Protection and Due Process challenges, finding that the statute was rationally related to a legitimate state interest, particularly in light of the United States Supreme Court's rejection of similar challenges in *Williamson v. Lee Optical*, 348 U.S. 483 (1955). The court also upheld the statute on the dormant Commerce Clause claim, holding that the statute was not discriminatory and did not impose a burden on interstate commerce "clearly excessive to the putative benefits" of the statute. On January 31, Lenscrafters filed a motion to alter or amend the judgment under Federal Rule 59, requesting that the district court reconsider its finding that some of their exhibits were inadmissible hearsay. On February 24, the district court revised its evidentiary rulings on four exhibits, but refused to alter or amend its judgment. Lenscrafters timely appealed the district court's decision on March 25.

III.

This Court reviews de novo a district court's grant of summary judgment. *Gribcheck v. Runyon*, 245 F.3d 547, 550 (6th Cir. 2001). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A court considering a summary judgment motion considers the facts in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Lenscrafters claims on appeal that the district court erred in holding that Section 63-8-113(c)(6) does not violate the dormant Commerce Clause, the Equal Protection Clause, or the Due Process Clause. We will address each claim in turn.

IV.

We first consider whether the district court erred in rejecting Lenscrafters's claim that Section 63-8-113(c)(6) is violative of the Commerce Clause. In short, Lenscrafters claims that the challenged provision impermissibly discriminates against interstate commerce by giving Tennessee optometrists a competitive advantage over their out-of-state competitors in the retail eyewear market.

"Although the Commerce Clause is by its text an affirmative grant of power to Congress, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 82 (1984). This limitation –

known as the "negative" or "dormant" Commerce Clause – prevents states from advancing their own economic interests by frustrating the movement of articles of commerce into or out of the state. In analyzing the constitutionality of a statute under the dormant Commerce Clause, this Court engages in a two-step inquiry. First, we determine "whether the statute directly burdens interstate commerce or discriminates against out-of-state interests." *E. Ky. Res. v. Fiscal Court of Magoffin County, Ky.*, 127 F.3d 532, 540 (6th Cir. 1997). If the statute is found to be discriminatory, it is virtually per se invalid and the Court applies the "strictest scrutiny." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 101 (1994). If, on the other hand, the statute is not discriminatory, we proceed to the second step to determine whether "the burdens on interstate commerce are 'clearly excessive in relation to the putative local benefits.'" *E. Ky. Res.*, 127 F.3d at 540 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). If the burdens are "clearly excessive," then the statute violates the Commerce Clause.

A.

The threshold question is whether Section 63-8-113(c)(6) is discriminatory. This Court has noted that a "statute can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *E. Ky. Res.*, 127 F.3d at 540 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)). The statute at issue here is not discriminatory on its face, so the only issues are whether the statute either purposefully, or in practical effect, discriminates against out-of-state interests.

Discriminatory Purpose

The burden of establishing that a challenged statute has a discriminatory purpose under the Commerce Clause falls on the party challenging the provision. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). As this Court has noted, "[w]hen a party seeks to present circumstantial evidence of a discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute." *E. Ky. Res.*, 127 F.3d at 542-43. Lenscrafters claims on appeal that the district court erred in concluding that Section 63-8-113(c)(6) did not purposefully discriminate against out-of-state optical stores, pointing to legislative history and documents from the optometrists' trade association that proposed and guided the law through the state legislature. The State, however, argues that the legislative history demonstrates that the provision was intended to apply to both in-state and out-of-state optical retail stores, and that there was no discriminatory animus behind the legislation.

We think that the district court was correct in holding that no rational factfinder could conclude that the challenged provision was purposefully discriminatory. First, Lenscrafters's argument that the legislative history of the statute suggests that its passage was motivated by a discriminatory purpose is unpersuasive. Lenscrafters points to no substantive evidence suggesting that this legislation had a discriminatory purpose. While Lenscrafters does cite several legislators' statements suggesting that the bill lacked a public purpose, the statements do not establish that the purpose of the legislation was to discriminate against out-of-state interests. Rather, the evidence suggests that the purpose of the legislation was

to apply the prohibition evenhandedly, to both instate and out-of-state optical retailers. The proponents of the legislation were seemingly concerned with optometrists who practiced in or in conjunction with any retail establishments, regardless of whether those establishments were owned by in-state or out-of-state interests. This nondiscriminatory purpose comports with the Tennessee Supreme Court's findings in *Sundquist*, where the court noted that to allow optometrists to practice in conjunction with businesses "would risk subordinating the standards of the optometry profession to the influence of commercial interests operated by lay business persons rather than by health care professionals." 33 S.W.3d at 778.

Second, the trade association documents cited by Lenscrafters similarly fail to expose any discriminatory origins of the statute. While some evidence suggests that the legislation was motivated by an organized effort to protect optometry from commercialism, none of the cited documents establishes that the purpose of the legislation was to discriminate against interstate retail eyewear companies. Therefore, the district court was correct to hold that Lenscrafters has not presented a genuine question as to whether Section 63-8-113(c)(6) was motivated by a discriminatory purpose.

Discriminatory Effect

Lenscrafters also argues that Section 63-8-113(c)(6) violates the dormant Commerce Clause because the practical effect of the provision is discriminatory against out-of-state competitors in the retail eyewear market. According to Lenscrafters, the statute gives in-state optometrists a competitive advantage in offering "one-stop

shopping." The State claims, however, that the law does not treat in-state and out-of-state interests differently because the burden placed on in-state and out-of-state companies is the same.

The district court rejected Lenscrafters's argument on this issue, finding that the argument attempted to compare entities that are not similarly situated – namely, in-state optometrists, considered healthcare providers under state law, and out-of-state optical companies, which are not considered healthcare providers. According to the district court, the similarly situated entities in the present case are optical stores owned by in-state interests and optical stores owned by out-of-state interests. Because the provision does not treat out-of-state and in-state retail stores differently, the court found that the similarly situated requirement was not satisfied and, consequently, there could be no discriminatory effect. On appeal, Lenscrafters claims that optometrists and out-of-state optical companies are similarly situated because they both compete for the same customers in the same market for retail eyewear.

We are convinced that the district court was correct to hold that Lenscrafters has failed to show that Section 63-8-113(c)(6) discriminates against similarly situated entities. As the United States Supreme Court has noted, "any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (discussing the similarly situated requirement in Commerce Clause cases). Section 63-8-113(c)(6) prohibits all optometrists from leasing space in any optical store, including those owned by in-state interests. Thus, the provision challenged here discriminates against Lenscrafters because it is a retail optical

store, not because it is an interstate company. Moreover, the provision does not discriminate among in-state and out-of-state optical stores, as both are prohibited from leasing space to optometrists.

What Lenscrafters actually argues is that Section 63-8-113(c)(6) favors in-state optometrists, who are allowed to sell retail eyewear, at the expense of optical stores that are prohibited from leasing space to optometrists. In our view, dispensing optometrists and optical stores are not similarly situated for Commerce Clause purposes. It is instructive to note the obvious differences between dispensing optometrists and optical retail stores. As the district court properly noted, licensed optometrists and optometric stores such as Lenscrafters are not similarly situated because they provide different services to the market. Unlike retail optical stores, licensed optometrists are healthcare providers and, as such, have unique responsibilities and obligations to their patients that are not shared by optometric stores.

In reaching this conclusion, we agree with the reasoning of the Fifth Circuit in *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), where the court considered the constitutionality of a state law prohibiting automobile manufacturers from acting as automobile dealers in Texas. Ford challenged the statute, claiming in part that it violated the dormant Commerce Clause by protecting in-state automobile dealers from out-of-state automobile manufacturers wishing to market automobiles. The court rejected the claim, finding that the challenged provision

> does not discriminate against independent automobile dealers seeking to operate in Texas. The section only prevents manufacturers, regardless

> of their domicile, from entering the retail market. Consequently, [the challenged law] does not protect dealers from out-of-state competition, it protects dealers from competition from manufacturers. Out-of-state corporations, which are non-manufacturers, have the same opportunity as in-state corporations to obtain a license and operate a dealership in Texas. Thus, [the law] does not discriminate among in-state and out-of-state manufacturers, nor does it discriminate among in-state and out-of-state dealers by raising the costs of doing business in the local market, stripping away the economic advantages for an out-of-state participant, or giving advantages to local participants. The absence of such discrimination, either facially or in practical effect, removes [the challenged law] from the Supreme Court's definition of a discriminatory law.

Ford Motor Co., 264 F.3d at 502.

Similarly, the challenged provision in the instant case does not discriminate among optical companies wishing to sell eyewear. Both in-state and out-of-state optical companies are prohibited from leasing space to optometrists. These optical companies, however, are allowed to sell eyewear to consumers; optometrists are simply prohibited from leasing space in optical stores. Lenscrafters argues, however, that the *Ford* rationale is inapplicable here because *Ford* merely applied the rule "that there is no discrimination against interstate commerce if the challenged state law leaves some out-of-state entities free to compete on an equal footing with in-state entities." What Lenscrafters fails to note, however, is that out-of-state optometrists are given the same opportunity to obtain a license to practice optometry and to sell eyewear incident to their practice. *See* Tenn. Code Ann. 63-8-115 (listing

application requirements to practice optometry). Thus, just as out-of-state corporations had the opportunity to obtain a license and open a dealership to sell automobiles in *Ford*, out-of-state optometrists have the same ability to obtain a license and sell eyewear incident to their practice in Tennessee.

Moreover, the fact that Section 63-8-113(c)(6) may disproportionately affect interstate optical companies is not determinative. As the United States Supreme Court has noted, "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978). Therefore, we find that the district court was correct in holding that Section 63-8-113(c)(6) does not have a discriminatory effect on interstate commerce.

B.

Because we hold that this provision is not discriminatory in purpose or effect, the question becomes whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. 137, 142 (1970). "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* As this Court has noted, "[t]he party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce." *E. Ky.*

Res., 127 F.3d at 545 (citing *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995)).

Having thoroughly reviewed the facts and arguments presented on this issue, we conclude that Lenscrafters has failed to show a genuine issue of material fact as to whether the burdens placed on interstate commerce are "clearly excessive" in relation to the putative benefits of the statute. In so concluding, we find that the district court's summary judgment for the State on this issue was well-reasoned and correct, with the exception of its inaccurate statement of the *Pike* test. In its opinion, the district court stated "that nondiscriminatory regulations that only incidentally burden commerce are valid 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Lenscrafters, Inc. v. Wadley*, 248 F. Supp. 2d 705, 728-29 (M.D. Tenn. 2003) (quoting *Pike*, 397 U.S. at 142). It appears to us that the court simply omitted the word interstate from its statement of the *Pike* test, as the inquiry in this context requires interstate commerce to be burdened. *See Pike*, 397 U.S. at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). Despite this typographical error, the district court's application of the *Pike* test was proper. Therefore, because we agree with the district court's reasoning on this issue, we adopt that reasoning and find it unnecessary to analyze the issue any further.

V.

The final issue is whether the district court was correct in concluding that Section 63-8-113(c)(6) does not violate the Equal Protection or Due Process Clauses. In our view, the statute at issue here does not target a suspect class, burden a fundamental right, or "shock the conscience," and is therefore subject to rational basis review. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996); *Mertik v. Blalock*, 983 F.2d 1353, 1367-68 (6th Cir. 1993). Under a rational basis review, a statute is valid if it rationally furthers a legitimate governmental interest. *Id.* "Under rational basis review, the statute will be accorded a strong presumption of validity, and we must uphold the statute 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)).

The district court was correct to dismiss Lenscrafters's Equal Protection and Due Process challenges to Section 63-8-113(c)(6). In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 490-91 (1955), the Supreme Court upheld a substantially similar Oklahoma law that prohibited a "person, firm, or corporation engaged in the business of retailing merchandise to the general public [from] rent[ing] space, subleas[ing] departments, or otherwise permit[ting] any person purporting to do eye examination or visual care to occupy space in such a retail store." Finding the provision to be an "attempt to free the profession, to as great an extent as possible, from all taints of commercialism," the Court held that the law had a "rational relation to that objective" and upheld the provision from constitutional attack under the Due Process and Equal Protection Clauses. *Id.* at 491.

Lenscrafters tries to distinguish the instant case from Lee Optical by claiming that unlike the law upheld in Lee Optical, the challenged provision here was passed for a protectionist purpose and is therefore distinguishable. In support of their claim, Lenscrafters cites *Metropolitan Life Insurance, Inc. v. Ward*, 470 U.S. 869, 880 (1985), where the Supreme Court struck down an Alabama statute that imposed lower tax rates on domestic insurance companies than on out-of-state companies. The Court's decision in *Metropolitan Life*, however, does not adequately support Lenscrafters's assertion that Section 63-8-113(c)(6) violates the Equal Protection or Due Process Clauses. In *Metropolitan Life*, the Court rejected the alleged legitimate government interests in finding that the challenged provision was merely an attempt to promote domestic businesses within the state. As noted above, we reject Lenscrafters's argument that the challenged provision was passed for a protectionist purpose. The State has offered a legitimate government objective – protecting healthcare professionals from commercial influences – and Section 63-8-113(c)(6) is rationally related to accomplishing that objective. Therefore, we affirm the district court's dismissal of Lenscrafters's Equal Protection and Due Process challenges to Section 63-8-113(c)(6).

VI.

For the foregoing reasons, we AFFIRM the summary judgment of the district court.

APPENDIX B

LENSCRAFTERS, INCORPORATED, Plaintiff, v. FREDIA WADLEY, in her Official capacity as Commissioner of the Tennessee Department of Health, et al., Defendants. CONSOLIDATED WITH U.S. VISION, COLE VISION CORPORATION, and NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS, v. FREDIA WADLEY, in her Official capacity as Commissioner of the Tennessee Department of Health, et al., Defendants.

Case No. 3:98-0150 CONSOLIDATED WITH Case No. 3:00-0096

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

JUDGES: ALETA A. TRAUGER, United States District Judge. MAGISTRATE JUDGE GRIFFIN.

JURY DEMAND

MEMORANDUM

Pending before the court are cross-Motions for Summary Judgment (Docket Nos. 163, 169) and responses thereto (Docket Nos. 197, 200) For the reasons discussed herein, the defendants' motion will be granted, and plaintiffs' motion will be denied.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Evidentiary Matters

As an initial matter, plaintiffs refer to a number of documents in support of their Motion for Summary

Judgment, as well as their Response to the defendant's Motion for Summary Judgment, that defendants have objected to as inadmissible under Federal Rules of Evidence 802 and 901. (Docket No. 197 at pp. 1-2). Because some of these objections are well founded, the court will not consider the inadmissible documents, except to the extent that they are incorporated into plaintiffs' expert testimony.

In addition, defendants have moved to strike (Docket No. 209) Plaintiff's Statement of Material Facts in Support of Response to Motion for Summary Judgment (Docket No. 202), or in the alternative for relief from Local Rule 8(b)(7), which the plaintiffs have opposed (Docket No. 211). The court finds that the Plaintiff's Statement of Material Facts is not a concise statement of additional facts (being 202 pages in length) and is redundant with regard to many of the facts set forth in Plaintiffs's Statement of Undisputed Facts in support of their own Motion for Summary Judgment. However, in lieu of striking Plaintiffs' Statement of Material Facts in Support of Response to Motion for Summary Judgment, the court will grant defendants' relief from the Local Rule and will consider the additional facts set forth by the plaintiffs only to the extent the court is certain that those facts could not be disputed.

Finally, plaintiffs have filed a Motion to Supplement the Record (Docket 212), which defendants have opposed (Docket No. 219). Because this evidence has been proffered subsequent to the close of discovery, plaintiffs' motion will be denied.

B. Parties[1]

Interstate optical firms, such as the plaintiffs, are businesses that employ licensed opticians.[2] The purpose of their businesses is to sell optical goods to consumers at the retail level. Plaintiffs operate retail optical stores in several states, including Tennessee.[3] In some states, plaintiffs sublet space and/or diagnostic equipment inside of their stores to licensed optometrists. In Tennessee, plaintiffs are prohibited from doing so by Tenn.Code.Ann. § 63-8-113(c)(6), which provides that:

> (c) It is unlawful for any licensed optometrist to:
>
> (1) Advertise optometric services or ophthalmic materials, except as provided in subsection (d);
>
> (2) Practice optometry as an employee of any person or business or organization not engaged primarily in health care delivery;

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[1] Unless otherwise noted, all facts have been drawn from Defendants' Response to Plaintiffs' Statement of Undisputed Facts (Docket No. 198) and Plaintiffs' Response to Defendants' Statement of Undisputed Facts (Docket No. 201).

[2] NAOA is not a retailer but an industry trade group of which plaintiffs and other optical goods retailers are members. In this litigation, NAOA is representing the interests of its optical retailer members.

[3] LensCrafters operates approximately 900 locations, which are located in 48 states. LensCrafters opened its first location in Tennessee in 1984 and presently operates 20 locations in the state. U.S. Vision operates approximately 650 locations across the country. Most of these locations operate inside retail stores such as J.C. Penney and Sears. The remaining locations are free-standing stores. Cole operates optical departments in Sears and Target stores and, through its affiliate, owns Pearle Vision Optical Superstores.

(3) Practice optometry under a name other than the optometrist's own unless board approved;

(4) Appoint agents or other persons to take orders for optometric services or ophthalmic materials;

(5) Split or share fees with any person or organization in return for solicitation of customers by that person or organization;

(6) Practice or offer to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale. Any licensed, registered optometrist practicing in premises of such type prior to April 17, 1967, shall be permitted to continue the independent practice in that optometrist's present location, or in such new location to which the retail store or other commercial establishment might move, but when any such optometrist vacates any such premises, no other optometrist shall be permitted to practice in such vacated premises; or

(7) Engage in practice in any temporary or mobile office except as authorized by the board, or any office which does not have the appropriate instrumentation for diagnosis and treatment for the practice of optometry as established by the board.

Defendants Richt, Spivey, Hendrickson, Abernathy, Foster, and Browder are members of the Tennessee State Board of Optometry. Defendant Browder is the consumer member of the Board. The remaining members of the

Board are Tennessee licensed optometrists.[4] Defendant Wadley is the Commissioner of the Tennessee Department of Health. All defendants are sued in their official capacities.

With respect to the Board's authority, Tenn.Code.Ann. § 63-8-112 provides in pertinent part:

> The board is given authority to:
>
> (1) Make rules, regulations, policies and procedures not inconsistent with the laws of this state, for the proper performance of its duties to carry out the purposes, and to enforce the provisions of this chapter;
>
> (2) Provide a standard of efficiency as to the moral, educational and experience qualifications and fitness of all persons who desire to practice optometry in Tennessee, in conformity with the provisions of this chapter;
>
> * * *
>
> (5) Investigate possible violations of and enforce the provisions of this chapter;
>
> * * *
>
> (7) Seek injunctions to prevent violations of this chapter. Such actions shall be brought in the chancery court of Davidson County or the chancery court of the county in which the defendant resides or does business. Such actions may be brought by ten (10) or more licensed optometrists or a state association of optometrists as well as by the board[.]

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[4] The optometrist members of the Board all sell optical goods incident to their practice of optometry.

The Department of Health is organized into divisions, among them the Division of Health Related Boards, which, concurrent with the Board of Optometry, is charged with enforcing the state's optometry laws.

C. Retail Optical Market

Prescription optical goods are sold from a number of outlets in Tennessee. These outlets include interstate optical stores, local optical stores, health maintenance organizations (HMOs), and dispensaries operated by optometrists and ophthalmologists incident to their practice. Plaintiffs refer to the optometrists and ophthalmologists who operate such dispensaries as dispensing optometrists and ophthalmologists. For ease of reference, the court will as well, even though the term has no legal significance. Plaintiff's economic expert, Dr. Daniel L. Rubinfeld, estimates that the share of the retail market occupied by the different outlets is as follows:

Dispensing Optometrists	39.2%
Dispensing Ophthalmologists	12.6%
Chains	34.5%
Local optical stores	10.9%
HMOs	2.9%

(Docket No. 163, Ex. 2 at p. 10) Dr. Rubinfeld's estimates are based upon data provided by Jobson's.[5] Defendants

[5] Jobson's provides an array of products and services to eyecare and eyewear professionals worldwide. The company gathers, analyzes and disseminates information and research about the ophthalmic industry, including market trends.

have offered unrefuted evidence that this data is often unreliable. (Docket No. 197 at pp. 17-19)

D. Practice of Optometry in Tennessee

Tennessee regulates and licenses optometrists, ophthalmologists, and opticians. *See* Tenn.Code.Ann. §§ 63-8-101 (optometrists), 63-6-101 (ophthalmologists), and 63-14-101 (opticians). Optometrists are required to have earned a doctor of optometry (O.D.) degree to obtain licensure in Tennessee. Upon being licensed, optometrists are authorized to examine eyes, prescribe corrective lenses, diagnose eye disease, and prescribe drugs to treat eye disease.[6] Optometrists are also authorized to dispense optical goods incident to their practice of optometry. As stated, those who do so will be referred to herein as dispensing optometrists. Those who do not dispense optical goods incident to their practice will be referred to as prescribing optometrists.

Ophthalmologists are medical doctors who have specialized in the diagnosing and treating of the eye. In addition to performing the functions carried out by optometrists, ophthalmologists are authorized to perform eye surgery.

According to the Tennessee Supreme Court's decision in *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772 (Tenn. 2001), Tennessee licensed optometrists are health care

[6] Optometry involves the diagnosis of ocular diseases and conditions. Through a competently performed eye examination, optometrists may detect the presence of medical conditions such as hypertension, diabetes, strokes, venereal disease, brain tumors, and multiple sclerosis.

providers.[7] Retail optical goods establishments are not health care providers. Rather, they are deemed "dispensing opticians" under Tenn.Code Ann. § 63-14-102. As such, plaintiffs are "allowed to prepare, adapt, and dispense lenses, spectacles, eye glasses, frames, and optical devices." *Id.* at 777. Businesses "in the practice of dispensing opticians" are also allowed to employ persons licensed as opticians, as long as the optician is "under the actual and personal supervision of partners, officers, managers or stockholders who possess valid unrevoked licenses as dispensing opticians entitled to practice in [Tennessee]." *Id.* (citing Tenn.Code Ann. § 63-14-103(d) (1997)). Thus, plaintiffs may sell ophthalmic lenses and frames and may employ opticians who dispense ophthalmic lenses and frames.

E. Legislative History of Tenn.Code.Ann. § 63-8-113(c)(6)

The prohibition on optometric practice in or in conjunction with retail establishments was introduced to the Tennessee legislature in 1967 as Senate Bill 302 and House Bill 336. Proponents of the bill stated that the bill was designed to prohibit optometrists from working in commercial establishments.[8] They argued that the proscription was

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[7] The Tennessee Supreme Court decided *LensCrafters* in response to a certified question posed by this court concerning the applicability of the challenged statutory provision to the plaintiffs.

[8] There is no data regarding the number of out-of-state chain optical stores operating in Tennessee at the time the legislation was proposed. However, Dr. Rubinfeld states that, as of 1974, "mass merchants had no significant penetration into the optical business, and chain optical firms accounted for a mere 10 percent of the market." (Docket No. 163, Ex. 2 at p. 12). Moreover, as recently as 1994, local

(Continued on following page)

necessary because "[t]he public may suffer whenever commercial interests interfere with the doctor-patient relationship." Others stated that the bill would also "upgrade the profession" and professional standards. Some legislators opposed the bill on the grounds that it would not achieve it [sic] stated purposes and was apparently designed to protect the interests of optometrists who did not practice in retail establishments. (Docket No. 163, Ex. 38 at pp. 35-36, 38)

An attempt to include a broad grandfather clause in the bill was defeated. One legislator explained the objections to the amendment as follows: "The situation is this, and the complaints that I heard during the interim recess were these: that the amendment would permit Sears & Roebuck & Co., Woolworth, Kresge's or other large establishments of this sort to perpetuate the department of optometry in their store." (Docket No. 163, Ex. 37 at p. 19)

F. Effect of Tenn.Code.Ann. § 63-8-113(c)(6) on Plaintiffs

Plaintiffs' preferred business model is to sublease space inside of their stores to independent optometrists. Plaintiffs refer to the offering of eye examinations in the same place as eyewear is sold as "one-stop" eyecare.

Plaintiffs maintain that dispensing optometrists obtain a competitive advantage from their ability to offer one-stop eye care. They note that, if they wish for their customers to have nearby access to an optometrist, they

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optometric retailers accounted for approximately 20% of the market for retail optical goods. (Id. at p. 13)

must construct a physically separate optometrist's office with a separate entrance from outside of their retail stores. Plaintiffs refer to locations where the optometrist's office is physically separate from the optical dispensary as "two-door stores."

Sometimes, plaintiffs are unable to locate a space for the optometrist immediately next to their retail store. In such case, the optometrist's office may be located several doors down or on a separate floor from the plaintiff's retail establishment.

Under Tenn.Code.Ann. § 63-8-113(c)(6), a Tennessee-licensed optometrist may not practice inside any retail store (as defined in *LensCrafters v. Sundquist*), whether it is owned by in-state or by out-of-state economic interests. Therefore, the effect of Tenn.Code.Ann. § 63-8-113(c)(6) upon the plaintiffs would be the same if they were domestic, Tennessee corporations.

G. Costs of Complying With Tenn.Code.Ann. § 63-8-113(c)(6)

Plaintiffs assert that their inability to offer one-stop eyecare impermissibly burdens their ability to compete in the retail optical market and, in turn, interstate commerce.

First, plaintiffs assert that the prohibition against optometric practice in a retail setting "interferes with the interstate optical firm's ability to take advantage of certain economies of scope that accompany the provision of eye exams and eyewear in the same premises." (Docket No. 163, Ex. 2 at pp. 20-24) That is, retail optical stores could reduce expenses if they were allowed to share office

staff, telephones, files, and storefront space with an onsite optometrist, engage in joint advertising, and offer combined customer service. Additionally, plaintiffs are unable to engage in techniques designed to increase sales of eyewear to eye exam patients, such as designing the layout of their offices to allow eye exam patients to browse their selection of frames while they wait for their exams.

Next, plaintiffs maintain that out-of-state chain optical stores would make up a larger share of the retail optical market if Tennessee did not prohibit them from offering one-stop eyecare. (Docket No. 163, Ex. 2 at p. 5) That is because consumers must obtain a prescription by undergoing an examination by a licensed optometrist or ophthalmologist prior to obtaining prescription eyewear (glasses or contact lenses). According to market researched reviewed by Dr. Rubinfeld, most purchases are preceded by an eye exam and most consumers prefer to buy their eyewear at the same place they obtain their eye examination and eyewear prescription. (Id. at pp. 4, 14, 17-19) Because plaintiffs cannot offer eye examinations in their retail stores, they are at a competitive disadvantage that deprives them of additional market share. (Id. at p. 20) Dr. Rubinfeld further opines that the plaintiffs suffer from reduced customer visits and decreased revenues when in restrictive states, such as Tennessee, as compared to non-restrictive states. (Id. at pp. 24-25).

Along similar lines, plaintiffs assert that Tenn.Code. Ann. § 63-8-113(c)(6) serves as a complete barrier to entry for some interstate firms. For example, America's Best, an interstate optical goods chain not party to this litigation, operates in the value segment of the retail optical industry. It offers low prices by delivering at low cost and by utilizing relatively inexpensive real estate, small efficient

space and efficient staff. For example, America's Best employs the same receptionist for the optical dispensary and the optometrist's office. In addition, America's Best provides staff to the optometrist to assist in maintaining patient records. America's Best has also attracted customers by combining eyewear and eye exams into one package price. America's Best would like to expand into the Tennessee market but does not believe that it can operate effectively here due to the two-door restriction.

Likewise, For Eyes Optical, another interstate retail optical goods store that is not a party, has considered operating stores in Tennessee and would like to do so. However, For Eyes has not entered the Tennessee market primarily because of the two-door restriction.

As additional evidence of the negative economic effects of Tenn.Code.Ann. § 63-8-113(c)(6), plaintiffs cite two studies that the Federal Trade Commission (FTC) undertook in 1975 and 1980 on the economic effects of state regulation of the retail market for optical goods. Regulations examined by the FTC during the studies included: (1) advertising restrictions; (2) consumers' access to their ophthalmic prescription; and (3) restrictions on optometric practice in commercial settings. The FTC concluded from the studies that "commercial practice restrictions resulted in higher prices for eyeglasses and eye examinations, but did not increase their quality." Additionally, research conducted by the FTC's Bureau of Economics showed that prices were 18% higher "in markets where chain firms are totally restricted than in markets where chain firms operate freely." The FTC attributed the higher prices to "inefficiencies of an industry protected from competition by state regulation." In particular, the FTC found that restrictions on practicing in commercial locations "imposed

unnecessary space, construction, or personnel costs that must be passed on to consumers." The FTC further found that, as a result of higher prices, "consumers obtain eye care less frequently than they otherwise would." When consumers do decide to seek eye care, their access to such care is also affected by commercial practice restraints because the restraints restrict the places where an optometrist may locate. The FTC found that commercial optometrists may be more conveniently located and may be more frequently available on weekends and evenings. (Docket No. 163 at Exs. 35, 36)

Finally, plaintiffs assert that they incur additional capital and operating costs as a result of having to construct and operate two-door stores. Specifically, LensCrafters has estimated that it costs $26,950 more per store to construct a two-door store than a one-door store. Cole incurs between $1,500 and $2,000 in extra fixtures for two-door Sears Optical locations and between $500 and $800 in extra fixtures costs for two-door Target Optical locations. Pearle Vision incurs extra fixture costs between $500 and $800 when it remodels a two-door store as opposed to a one-door store.

When building a two-door store, plaintiffs also must find a space that is sufficient in size and location to accommodate a two-door location. Some optometrists are hesitant to work at two-door locations where the outside entrance to the optometrist's office opens directly onto a dark parking lot or is distant from the retail store. Once the two-door stores are built, plaintiffs incur increased operating costs due to the need to maintain two offices as opposed to one office alone.

H. Putative Benefits of Tenn.Code.Ann. § 63-8-113(c)(6)

In support of the statute, defendants presently argue that the prohibition on optometric practice in retail and other commercial establishments:

> 1. ensures that the practice of an optometrist licensed in Tennessee will not be controlled by a non-licensed entity;
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> 2. ensures the continuity of the doctor-patient relationship;
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> 3. maintains the integrity of the optometric profession;
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> 4. ensures 24-hour access to an optometrist's office;
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> 5. ensures that an unregulated entity will not interfere in the doctor-patient relationship; and
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> 6. eliminates confusion in the public as to the source of optometry services.

Defendants assert that the benefits of the statute were recognized by the Tennessee Supreme Court in *LensCrafters v. Sundquist*, 33 S.W.3d 772. There the Court found that the prohibition on practice in retail establishments serves to shield optometrists from the risk of control by an unlicensed entity. The court further found that allowing optometrists to practice in conjunction with businesses "in the practice of dispensing opticians" may involve a compromise of the optometrist's professional autonomy and would risk subordinating the standards of the optometry profession to the influence of commercial

interests operated by lay business persons rather than by health care professionals.[9]

As evidence that retail optical establishments, in fact, have intruded into the practice of the optometrists to whom they sublease space, defendants proffer several examples, which plaintiffs have not refuted.[10] For example, many of the plaintiffs have reviewed the optometrist's appointment book, scheduled appointments for the optometrist, dictated the hours and days that the optometric practice must be staffed, and prohibited the optometrist from working at any other optometric locations. There is also evidence in the record that some patients have been unclear about the relationship between plaintiffs and the optometrists to whom they rent space. Some Cole Vision employees have access to a leasing optometrist's patient records. Another optometrist allows his patient records to be located inside of a J.C. Penney Optical Store operated

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[9] According to LensCrafters' own market research, most customers who buy their eyewear from dispensing optometrists and ophthalmologists cite "trust" as their reason for doing so. (Docket No. 163, Ex. 2 at p. 15 n.32).

[10] Defendants have proffered additional examples of optical retailers' interference with the practice of the optometrists to whom they lease space, but these examples have been disputed by the plaintiffs. Notably, however, plaintiffs acknowledge that Eye Clinic 20/20, Inc., an in-state optical retailer, entered into a lease with one of its optometrists that: (1) guarantees an annual income of $75,000; (2) requires him to schedule patients every 15 minutes; (3) requires him to accept exam fees established by Eye Clinic 20/20; (4) requires him to recommend UV protection, progressives, anti-reflective coating, polarization, and all state-of-the-art products to every applicable patient without regard to cost; (5) requires him to recommend premium products without regard to the patient's ability to pay for such products; and (6) requires him to permit Eye Clinic 20/20 to advertise his services. (Docket No. 202 at p. 63)

by U.S. Vision. U.S. Vision employees have access to and sometimes access those files, ostensibly to verify a prescription. With regard to at least one of the optometrists with whom U.S. Vision has entered an Equipment Lease, U.S. Vision employees have suggested that the optometrist recommend coating and tinting to his patients. With regard to at least some of the optometrists to whom Wal-Mart leases office space, Wal-Mart employs all of the office staff who work in the optometrists' offices. These employees maintain patient records and the appointment book.

The plaintiffs dispute whether the prohibition on optometric practice in retail and commercial establishments confers any benefits whatsoever. They note that, although states often justify their commercial practice restrictions on the basis that "they are necessary to maintain high-quality vision care," the FTC's 1980 study found that "the record is quite clear on this central issue: There is no difference in the average quality of care available to consumers in restrictive and non-restrictive markets." (Docket No. 163, Ex. 36 at 10290)

The 1980 study was based, in part, on research undertaken by the FTC's Bureau of Economics in conjunction with optometrists on the faculties of the New York and Pennsylvania Colleges of Optometry. The study used 19 researchers who "posed as consumers and purchased over 400 eye exams and over 230 pairs of eyeglasses from optometrists in twelve different metropolitan areas across the country," including Knoxville, Tennessee. The study found "no significant difference" in material components of eye care, including "the accuracy of prescriptions, the accuracy and workmanship of eyeglasses, the extent of unnecessary prescribing, and the ability to detect eye problems and pathologies."

According to the plaintiffs, "the results of the Bureau of Economics study confirmed the FTC's expectations about the relationship, or lack thereof, between restrictions and quality of care[.]" In this regard, the study concluded:

> There is no apparent *a priori* reason why one would expect these restrictions on business practices to affect the quality of professional care. Both commercial and noncommercial optometrists have similar licensing examinations in order to practice. Commercial optometrists face the same incentives as noncommercial optometrists to satisfy consumer demand and provide an acceptable quality of eye care. Private optometrists, like commercial firms, must earn a profit in order to stay in business and both types of practitioners seek to generate profits by selling eyewear. Practitioners in both groups must maintain a good reputation in order to attract and hold the loyalty of patients.

(Docket No. 163, Ex. 36 at 10291)

Based upon the 1975 and 1980 studies, the FTC promulgated a final rule in 1989 declaring four types of state-imposed restrictions on commercial practices to be unfair acts or practices. State restrictions on practice in commercial settings was one of the restrictions declared illegal. The FTC justified its promulgation of the Rule on the basis that it would be good for competition and, in turn, consumers:

> As restrictions on commercial practice are removed, competition among optometrists should increase. Lower prices should then result from this increased competition and from economies of scale achieved by larger optometric providers.

> Lower prices will also increase the availability of ophthalmic goods and services to consumers who before could afford services infrequently, or in some instances, not at all.

(Docket No. 163, Ex. 36 at 10290) The FTC noted that an additional benefit to consumers flowing from enactment of the Rule was that "consumers will benefit from their ability to choose, if they wish, the convenience of one stop service (eye examinations plus eyeglass or contact lens dispensing) from optometrists or retail optical firms who employ optometrists." (Docket No. 163, Ex. 36 at 10303)

The FTC's Rule was challenged by the American Optometric Association, the California Optometric Association, and several states. *See California State Board of Optometry v. FTC*, 285 U.S. App. D.C. 476, 910 F.2d 976 (D.C.Cir. 1990). The optical associations and states challenged the Rule on statutory and constitutional grounds and also "attacked the factual record upon which the FTC based its decision to adopt the rule." The Court vacated the Rule on the ground that the FTC lacked statutory authority to promulgate it. The court did not address the petitioners' alternative argument that the factual record upon which the FTC based the Rule was deficient. Thus, the plaintiffs assert that the FTC's findings in support of the Rule have never been invalidated or overruled.

As additional evidence that the prohibition on practice in retail establishments is of no benefit, the plaintiffs note that some present and former members of the Tennessee Board of Optometry testified in deposition that they did not know the purpose or benefits of the prohibition. Indeed, many Board members admit that they have no evidence that optometrists who practice in retail establishments provide a lower quality of care than

optometrists who do not.[11] Moreover, the plaintiff's expert, Dr. G. Richard Bennett, is of the opinion that the restrictions on practice in commercial settings may actually have a negative effect on the health, safety, and welfare of Tennessee citizens.

Plaintiffs further assert that dispensing optometrists are no less subject to commercial pressures than their counterparts who lease space from retail optical establishments. Notably, the optometrist defendants in this case reported that 90-98% of their eyewear customers also are eye care patients and that 40-60% of their profits result from optical goods sales. Additionally, there is evidence that dispensing optometrists engage management consultants to assist them in increasing the profitability of their dispensaries.

For example, Professional Vision Group (PVG) is a management consulting firm whose principal, Richard Omohundro, is not an optometrist. PVG has had approximately 24 Tennessee optometric practices and one Tennessee ophthalmology practice purchase its consulting services in the past ten years. It currently has five customers in Tennessee. Two current members of the Board and one past member have purchased PVG's practice management services. PVG has offered a continuing education course called "Merging Professionalism With Profits" to members of the Tennessee Optometric Association. PVG charges dispensing optometrists $1,500 per month for its practice management consulting services. PVG advises its clients that, to grow their practice, they

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[11] All optometrists are subject to the same education and licensure requirements regardless of where they practice.

should work on improving their referral base, patient recall, and revenue per patient. PVG also teaches optometrists on how to increase revenue from the sale of eyewear.

PVG taught Board Chair Dr. Richt how to use a lifestyle dispensing system to increase revenue from eyewear sales. Lifestyle dispensing has two components: asking a patient about his or her particular visual demands, and then educating the patient about the various eyewear options available to meet those visual demands. Other members of the Board also ask their patients about their lifestyle while administering eye examinations. In addition, some Board members use patient questionnaires to obtain information from patients about their hobbies, occupation, and social activities. These questionnaires are available to the optometrists' dispensing staff.

Other optometrist Board members have designed the layout of their offices so that patients move from the waiting room, to a pretesting area, to the examination room, to the dispensary, and, finally, to check-out. Three of the optometrist Board members personally escort their patients to the dispensary. There the optometrist, the patient, and a dispensary technician engage in a three-way conversation about the patient's prescription and eyewear needs. Several Board members also cross-train some of their staff members to work in their dispensary. In some cases, Board members offer their dispensary staff bonuses for selling lens upgrades, lens add-ons, and higher-priced frames. One former member candidly admits that the purpose of commissions is to encourage selling and to increase the dispensary's revenue.

Plaintiff's expert Dr. Bennett is of the opinion that "some of the more difficult problems that arise with

spectacle prescription happen in settings where there is no continuity between the prescribing doctor and the dispensing optician." Important information about a patient's visual requirements may not be shown on a prescription; when there is a break in the continuity of care, this information may not be communicated to the necessary persons. All of the optometrist Board members agree that it is in the patient's best interest for the examining optometrist to make recommendations to their patients about appropriate eyewear and explain available lens options.

Furthermore, several Board members testified that they participate in managed care plans that place limitations on the goods and services that they may provide to their patients. One former Board member testified that he believes managed care creates pressure to see more patients due to low compensation. Plaintiffs' expert Dr. Bennett stated that managed care allows non-licensed entities to control the frequency of examinations, referrals to specialists, the availability of diagnostic tests, and availability of specific medicines – the very evils at which the prohibition on practice in commercial establishments is directed.

Finally, plaintiffs argue that the Board's history of not enforcing Tenn.Code.Ann. § 63-8-113(c)(6) undercuts any claim that the statute serves a beneficial purpose.

I. History of Enforcement of Tenn.Code.Ann. § 63-8-113(c)(6)

In March 1991, the Board of Optometry voted to send a letter to "commercial establishments who provide optometric services," requesting that they provide the Board with the names of all optometrists practicing within their

facilities and copies of any financial agreements between the commercial establishments and the optometrists. In response to the Board's letter, plaintiffs LensCrafters and Pearle each advised the Board that they do not employ optometrists and were not, to the best of their knowledge, acting in violation of the optometry statutes.

On July 23, 1991, the Board sent a memorandum to all Tennessee licensed optometrists advising them that the state Attorney General had determined that the prohibition against practice in or in conjunction with retail establishments was constitutional and enforceable. The stated purpose of the memorandum was:

> To notify all those who are practicing in [retail stores or other commercial establishments where merchandise is displayed or offered for sale] that they are in conflict with the Tennessee Optometric Practice Act. It is the Board's duty to enforce the Practice Act regarding this violation as well as other violations and the Board intends to pursue this purpose.

In 1991 and 1992, the Board Consultant, in conjunction with the Office of General Counsel (OGC) of the Department of Health, opened complaints against several optometrists who were allegedly practicing in conjunction with Wal-Mart stores. All of the complaints were closed on the condition that the optometrists close off access to their offices from Wal-Mart's Vision Centers and offer access to their offices only from outside of the stores. None of the optometrists was required to change the terms of leases or compensation agreements. Nor were they required to alter their treatment of their patients.

In 1991, the OGC and the Board Consultant opened twelve (12) complaints against optometrists affiliated with LensCrafters, twenty-three (23) complaints against optometrists affiliated with Pearle, and one complaint against an optometrist affiliated with Sears Optical. Investigations were undertaken in only eight of the 36 cases. The OGC and Board Consultant determined that no violations of the Optometry Practice Act had occurred. This determination was made, even though some of the optometrists' offices could only be accessed from inside the retail store in which they were located.

On July, 6, 1993, Patricia Crotwell sent a complaint to the Department of Health concerning Dr. Jeffrey Rothman, who subleases space from LensCrafters at Rivergate Mall in Goodlettsville, Tennessee. Ms. Crotwell complained that Dr. Rothman had refused to release her contact lens prescription so that she could have it filled elsewhere, an act which she believed was a violation of the Optometry Practice Act. Ms. Crotwell also stated that she believed that Dr. Rothman was violating the prohibition against practice in a retail or commercial setting because his office was located "inside the LensCrafters building . . . [with] no discernable separate entrance." The OGC and Board Consultant recommended that an investigation go forward on the alleged violation of the prohibition against practicing inside of a retail establishment. On April 25, 1995, an investigator finally paid a visit to Dr. Rothman's office at the Rivergate Mall. The investigator also spoke with Dr. Rothman by phone. At that time, Dr. Rothman informed the investigator that LensCrafters had replaced the interior door between his office and the LensCrafters store with an open archway in 1994 when it had remodeled. On June 23, 1995, the

Board Consultant recommended that formal disciplinary action be initiated against Dr. Rothman for "practicing in a retail establishment."

On March 6, 1996, a Notice of Charges and Memorandum of Assessment of Civil Penalty was filed against Dr. Rothman. Dr. Rothman was charged with a violation of the Optometry Practices Act based upon the fact that his office "has not been physically separated from the retail establishment operated by LensCrafters." After a hearing before an Administrative Law Judge, the Board found Dr. Rothman in violation of the statute by a vote of 3 to 1.

The Board further voted that to comply with the statute, Dr. Rothman must:

> 1. cause to be constructed an entrance into his office from the exterior of the building located at 910 Two Mile Parkway, Goodlettsville, Tennessee so as to allow patients to enter his practice without entering the retail establishment operated by LensCrafters.
>
> 2. cause to be constructed a continuous wall, or such wall as to be necessary to provide a continuous wall between the area [of] his office and that portion of the building occupied by LensCrafters, at the premises set forth above, to include a door which is both closeable and lockable.

Dr. Rothman was ordered to make the modifications to his office within 30 days after entry of the Board's order and was assessed a total penalty of $1,000.

When directed by the Administrative Law Judge to articulate a "public welfare" reason for its ruling, the Board stated that it "feels it is important for the public to have access to their optometrists, and the care the

optometrist supplies, without being influenced by a retail establishment."

The Board's order was stayed and eventually overturned on petition for review by the Chancery Court. The state Attorney General refused to defend the Board's order in the Chancery Court proceedings, arguing that the Board had incorrectly construed the statute. The Attorney General argued that the statute should be construed "only as banning optometrists from practicing 'in, or in conjunction with, any retail store or other commercial establishment' that is not engaged primarily in the practice of dispensing opticians." This argument was eventually rejected by the Tennessee Supreme Court in *Lens Crafters v. Sundquist* as will be discussed *infra*.

J. Procedural History

On February 19, 1998, LensCrafters filed suit, challenging the constitutionality of Tenn. Code Ann. § 63-8-113(c)(6) as violative of the Fourteenth Amendment's Equal Protection and Due Process Clauses and the Commerce Clause of Article I of the United States Constitution. LensCrafters seeks injunctive relief under 42 U.S.C. § 1983 against the operation and continued enforcement of Tenn. Code Ann. § 63-8-113(c)(6) and a declaration under 28 U.S.C. § 2201 that Tenn. Code Ann. § 63-8-113(c)(6) is unconstitutional.

LensCrafters' suit in federal court was prompted by the state disciplinary action initiated by the Board against Dr. Rothman. While Dr. Rothman's suit was pending in

Chancery court, LensCrafters filed the instant suit here in federal court.[2]

On July 27, 1998, the defendants filed a Motion to Dismiss, arguing that LensCrafters could not satisfy the case or controversy requirement or, in the alternative, that LensCrafters' case was moot. (Docket No. 18) On December 14, 1998, Chief Judge Echols denied their Motion to Dismiss, finding that LensCrafters had standing to challenge the constitutionality of the statute. (Docket No. 25)

On January 8, 1999, the case was transferred to this court. On February 8, 1999, defendants filed their first Motion for Summary Judgment. (Docket No. 29) In support of their first Motion for Summary Judgment, the defendants primarily argued that summary judgment should be granted in their favor because the court could decide the case without reaching the constitutional issues raised by LensCrafters. As framed by the defendants, the

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[2] In the state court proceedings in Chancery Court, the Attorney General submitted a response to Dr. Rothman's Amended Petition for Review that did not oppose reversal of the Board's final order and stated that the Board's construction of the statute raised constitutional issues which could be avoided by an alternative construction of the statute.

On June 25, 1998, the Davidson County Chancery Court reversed the Board's final order, finding that the Board's construction of Tenn. Code Ann. § 63-8-113(c)(6), which prohibited Dr. Rothman from practicing "in, or in conjunction with" LensCrafters, could not be justified. The Chancery Court further found that a "corporation engaged primarily in the business of selling and dispensing ophthalmic lenses and frames is in the 'practice of dispensing opticians' and, therefore, is not a 'retail store or other commercial establishment' within the meaning of Tenn. Code Ann. § 63-8-113(c)(6)." (Docket No. 19, Ex. C at 27-28) The Chancery Court's construction of the statute was later rejected by the Tennessee Supreme Court in response to a certified question from this court.

issue for the court was whether LensCrafters should be considered a "retail store or other commercial establishment" for purposes of Tenn. Code Ann. § 63-8-113(c)(6). On this issue, defendants asked the court to ignore the Board's construction of this statutory provision in the proceedings against Dr. Rothman, wherein it stated that Tenn. Code Ann. § 63-8-113(c)(6) prohibited an optometrist from practicing "in, or in conjunction with" a business such as LensCrafters. Instead, the defendants asserted that the court should follow the interpretation of §63-8-113(c)(6) adopted by the Chancery Court in *Rothman v. Tennessee Bd. of Optometry*. (Defendants' Mem. at 5) Implicit in the defendants' arguments was the belief that the Board's construction of § 63-8-113(c)(6) rendered the statute unconstitutional.[13]

In response, LensCrafters asserted that, even if the court were to adopt such a reading of Tenn. Code Ann. § 63-8-113(c)(6), LensCrafters would still not be protected from future harm, since the court's interpretation of this statutory section would not be binding on state courts. Accordingly, LensCrafters sought to have the question of whether LensCrafters is to be considered a "retail store or other establishment" for purposes of Tenn. Code Ann. § 63-8-113(c)(6) certified to the Tennessee Supreme Court.

The court agreed with LensCrafters and certified the following question to the Tennessee Supreme Court:

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[13] It is important to note, however, that at that time Governor Sundquist was the primary defendant and he was represented by the Attorney General's Office. Commissioner Wadley is now the primary defendant, and representation of the defendants has been transferred to a private law firm.

> Whether an entity engaged primarily in the business of selling and dispensing ophthalmic lenses and frames is a "retail store or other commercial establishment" within the meaning of Tenn.Code Ann. § 63-8-113(c)(6)?

In their briefs to the Tennessee Supreme Court, both parties argued that it would be unconstitutional to construe the statute to include entities such as LensCrafters. The Tennessee Supreme Court disagreed and stated:

> The parties in this case contend that this Court should interpret Tenn.Code Ann. § 63-8-113(c)(6) to exclude businesses which sell ophthalmic lenses and frames because a contrary interpretation would render the statute unconstitutional. They contend that the restriction against practicing in or in conjunction with a retail store discriminates against out-of-state stores, thereby unduly burdening interstate commerce. We begin by discussing the constitutional aspects of the parties' construction of the statute.
>
> The states are allowed great leeway under their police power to adopt regulations that protect the health and safety of their citizens. Although the Constitution confers "upon Congress the regulation of commerce, . . . [it was] never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S. Ct. 813, 816, 4 L. Ed. 2d 852 (1960), quoted in *Head v. New Mexico Bd. of Exam. in Optometry*, 374 U.S. 424, 428, 83 S. Ct. 1759, 1762, 10 L. Ed. 2d 983 (1963). Although regulations adopted under the police

power may indirectly impose a burden on interstate commerce, they are not unconstitutional unless they are shown to "discriminate against interstate commerce or operate to disrupt its required uniformity." *Huron Portland Cement Co.*, 362 U.S. at 448, 80 S. Ct. at 818.

The statutory regulations on optometry pertinent here in effect insulate optometrists from non-health care commercial entities. The purpose of this insulation is to prohibit the formulation of business relationships between optometrists and such entities. The policy supporting such prohibitions is that preservation of an unbroken relationship between the professional and the patient is best achieved by shielding the professional from the risk of control by an unlicensed person or entity. *See Cole Vision v. Dept. of Bus. and Prof.*, 688 So.2d 404, 409 (Fla.Dist.Ct.App.1997).

A review of analogous precedent shows that regulations prohibiting optometrists from practicing optometry as a servant of an unlicensed optical business, though affecting interstate commerce, have been held to be constitutional. *See Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Examr's in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963); *Sears, Roebuck & Co. v. State Bd. of Optometry*, 213 Miss. 710, 57 So.2d 726 (1952); *see also* 61 Am.Jur.2d Physicians, Surgeons, etc. § 157 (1981); 88 ALR 2d 1290, 1294 § 3[a]. In upholding the constitutionality of a statute prohibiting those "engaged in the business of retailing merchandise" from renting out space for eye examinations, the United States Supreme Court stated:

> It seems to us that this regulation . . . is an attempt to free the profession, to as great an

> extent as possible, from all taints of commercialism. It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment. In any case, the opportunity for that nexus may be too great for safety, if the eye doctor is allowed inside the retail store. Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491, 75 S. Ct. 461, 466, 99 L. Ed. 563 (1955).

Our Court has stated similar concerns justifying such regulations when addressing the question of optometrists being employed by corporations:

> The logical result would be that corporations and business partnerships might practice law, medicine, dentistry or any other profession by the simple expedient of employing licensed agents. And if this were permitted professional standards would be practically destroyed, and professions requiring special training would be commercialized, to the public detriment. The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence he cannot properly act in the

> practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character.
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> *State ex rel. Loser v. National Optical Stores Co.*, 189 Tenn. 433, 225 S.W.2d 263, 269 (1949).
>
> We conclude that even were the statute to prohibit the practice of optometry in LensCrafters's stores, it would still be constitutional. Therefore, our construction of the statute is not affected by constitutional concerns.

LensCrafters, Inc. v. Sundquist, 33 S.W.3d at 775-77.

After disposing of the constitutional challenge, the Tennessee Supreme Court turned to the proper construction of Tenn.Code Ann. § 63-8-113(c)(6). On this issue, the Court opined:

> Here, the natural and ordinary meaning of the language used, "any retail store . . . where merchandise is . . . offered for sale," would include ophthalmic superstores such as LensCrafters. The parties maintain, despite the absence of language exempting ophthalmic stores, that the intent of our legislature in enacting the provision before us was to prevent optometrists from practicing in department stores and not stores which specialize in selling ophthalmic supplies.
>
> To support their assertion that applying Tenn.Code Ann. § 63-8-113 *to* ophthalmic stores would be inconsistent with the statutory scheme considered as a whole, the parties point to sections of our Code which suggest an "overlap" between the work of dispensing opticians and optometrists. The parties note that LensCrafters

is a business "in the practice of dispensing opticians" under Tenn.Code Ann. § 63-14-102 and thus is allowed to prepare, adapt, and dispense lenses, spectacles, eye glasses, frames, and optical devices. They further note that opticians are permitted to practice as employees of businesses "in the practice of dispensing opticians" if they are "under the actual and personal supervision of partners, officers, managers or stockholders who possess valid unrevoked licenses as dispensing opticians entitled to practice in [Tennessee]." *See* Tenn.Code Ann. § 63-14-103(d) (1997). Thus, LensCrafters may sell ophthalmic lenses and frames and may employ opticians who dispense ophthalmic lenses and frames.

Likewise, the parties note that optometrists are permitted to employ dispensing opticians. *Id.* § 63-14-105 ("Nothing contained in this chapter shall be construed to prohibit a . . . licensed optometrist from employing a licensed dispensing optician as defined in this chapter."). Moreover, they note that selling glasses has long been a part of the practice of optometry and that the statutory scheme contemplates that optometrists should be allowed to sell ophthalmic lenses and frames. *See id.* § 63-8-102(12)(D). Thus, like businesses "in the practice of dispensing opticians," optometrists also may hire opticians to sell and dispense ophthalmic lenses and frames.

The basic thrust of the parties' argument is that the statutes governing opticians and optometrists are inconsistent because they allow a business "in the practice of dispensing opticians" to hire dispensing opticians and sell ophthalmic products, and they allow an optometrist to hire dispensing opticians and sell ophthalmic products, but they do not allow a business "in the

practice of dispensing opticians" to form a business association with an optometrist. The parties contend that the similarities between optometrists and businesses "in the practice of dispensing opticians" render unjustifiable any argument that relationships between such businesses and optometrists would degrade the profession of optometry.

The parties fail, however, to recognize that allowing optometrists to practice in conjunction with businesses "in the practice of dispensing opticians" may involve a compromise of the optometrists' professional autonomy. Such does not occur when an optometrist operates an independent business which employs opticians to dispense and sell ophthalmic lenses and frames. *Cf.* Tenn.Code Ann. § 63-8-113(c)(2), (5) (1997 Repl.). Furthermore, there is no statute condoning an optometrist's professional association with or employment by dispensing opticians. *See id.* § 63-8-113. The reason for this is that opticians are not health care professionals; they are specifically prohibited from examining eyes or diagnosing, treating, or correcting "any human ailment . . . or physical condition." *Id.* § 63-14-102(2). Consequently, although optometrists permissibly may employ dispensing opticians, to allow optometrists to form business associations with dispensing opticians – or with businesses "in the practice of dispensing opticians," such as LensCrafters – would be equivalent to allowing optometrists to form business associations with non-health care provider commercial entities. By allowing such business associations, we would risk subordinating the standards of the optometry profession to the influence of commercial

interests operated by lay business persons rather than by health care professionals.

In holding that businesses which sell ophthalmic lenses and frames are retail establishments within the meaning of Tenn.Code Ann. § 63-8-113(c)(6), we must also address whether this interpretation renders the optometry statute internally inconsistent. Although this argument was not raised by the parties, one might assert that optometrists are allowed to sell lenses and frames within their own practice, Tenn.Code Ann. § 63-8-102(12), and yet by doing so, they violate the prohibition against practicing in a "retail store . . . where merchandise is . . . offered for sale." However, we decline to hold that this inconsistency requires that the phrase "retail store or other commercial establishment" be interpreted to exclude stores engaged primarily in the business of selling and dispensing ophthalmic lenses and frames. A more reasonable interpretation is that the phrase "retail and commercial establishments" refers to "non-health care profession". commercial entities. We reach this conclusion in large part by reference to Tenn.Code Ann. § 63-8-113(c)(2), which implicitly allows an optometrist to be employed by persons and entities "engaged primarily in health care delivery." This construction of the statute prevents the "lay control of optometrists" advances the goal of encouraging a direct line of responsibility from licensed optometrists to their patients, and further allows optometrists to practice in professional associations with other licensed health care professionals who are not only in the practice of health care delivery, but who also sell ophthalmic products.

LensCrafters, Inc., 33 S.W.3d at 777-79.

While the certified question in *LensCrafters* was pending before the Tennessee Supreme Court, plaintiffs U.S. Vision, Cole Vision, and the NAOO filed a separate action challenging the constitutionality of Tenn. Code. Ann. § 63-8-113(c)(6). That action was initially stayed pending the Tennessee Supreme Court's resolution of the certified question put to it in *LensCrafters*. Subsequently, the two cases were consolidated.

On March 14, 2002, plaintiffs filed a consolidated Second Amended Complaint seeking both declaratory and injunctive relief. (Docket No. 127) In their Consolidated Complaint, plaintiffs again challenge Tenn.Code Ann. § 63-8-113(c)(6), which they refer to as the "Eye Exam Prohibition" or "EEP", as violative of three separate constitutional provisions: (1) the Dormant Commerce Clause; (2) the Equal Protection Clause; and (3) the Due Process Clause.

Plaintiffs have moved for summary judgment in their favor only on the Dormant *Commerce Clause* challenge. Defendants have filed a cross-motion for summary judgment on all three challenges.

II. SUMMARY JUDGMENT STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

To prevail, the moving party must meet the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 202, 106 S. Ct. 2548, 2553 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). In determining whether the moving party has met its burden, the court must view the factual evidence and draw reasonable inferences in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). "The court's function is not to weigh the evidence and determine the truth of the matters asserted, 'but to determine whether there is a genuine issue for trial.'" *Little Caesar Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547, 551 (6th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)). If the nonmoving party, however, fails to make a sufficient showing on an essential element of the case with respect to which the nonmoving party has the burden, the moving party is entitled to summary judgment as a matter of law. *See Williams v. Ford Motor Co.*, 187 F.3d 533, 537-38 (6th Cir. 1999).

To preclude summary judgment, the nonmoving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." *Gaines v. Runyon*, 107 F.3d 1171, 1174-75 (6th Cir. 1997). The nonmoving party must show that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. To determine whether the nonmoving party has raised a

genuine issue of material fact, the evidence of the nonmoving party is to be believed and all justifiable inferences drawn in his favor. *Id.* at 255, 106 S. Ct. at 2513.

The court should also consider whether the evidence presents "a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Street*, 886 F.2d at 1479. "There is no genuine issue for trial unless the nonmoving party has produced enough evidence for a jury to be able to return a verdict for that party." *Tinsley v. General Motors Corp.*, 227 F.3d 700, 703 (6th Cir. 2000). If the evidence offered by the nonmoving party is "merely colorable," or "is not significantly probative," or enough to lead a fair-minded jury to find for the nonmoving party, the motion for summary judgment should be granted. *Anderson*, 477 U.S. at 249-252, 106 S. Ct. at 2510-12. "A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Hill v. White*, 190 F.3d 427, 430 (6th Cir. 1999) (citations omitted).

In ruling upon cross-motions for summary judgment, this court must rule on each motion independently, deciding in each instance whether the moving party has met its burden under Rule 56.

III. ANALYSIS

A. Law of the Case

As a threshold matter, the defendants generally argue that the constitutionality of the Tenn.Code.Ann. § 63-8-113(c)(6) was decided by the Tennessee Supreme Court in *LensCrafters*, 33 S.W.3d 772, and that this court is bound by the Tennessee Supreme Court's holding because it

constitutes the law of the case. This argument is without merit.

Although the cases cited by the defendants on this issue do hold that a state court's answer to a certified question constitutes the law of the case, none of the cases involved state courts resolving a party's federal constitutional challenge incident to answering the questions certified to them. Therefore, the cases cited by the defendant do not hold that a state court's answer to a certified question on matters of state law constitutes law of the case as to federal issues initially presented in federal court pleadings.

In any event, plaintiffs were entitled to reserve the right to return to federal court for resolution of their federal constitutional claims under the Supreme Court's decision in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 421, 84 S. Ct. 461, 467, 11 L. Ed. 2d 440(1964).[14] In this case, LensCrafters' brief to

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[14] Justice Breyer, when he was seated on the First Circuit Court of Appeals, explained the holding of *England* as follows:

> That case permits a plaintiff who files a case in federal court before state proceedings begin to tell the state court that it wishes to litigate its federal claim in that federal court; it thereby permits the federal court to engage in *Pullman* (not *Younger*) abstention, a form of abstention that permits the federal court, in effect, to ask a state court to clarify a murky question of state law involved in the case, while permitting the plaintiff to return to the federal forum for determination of the federal question after the state court has decided the issue of state law. *See id.;* 17A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4243, at 72-81 (1988 & Supp.1989).

Duty Free Shop, Inc. v. Administracion De Terrenos De Puerto Rico, 889 F.2d 1181, 1182-83 (1st Cir. 1989).

the Tennessee Supreme Court specifically advised the Justices that it reserved the right to further challenge the constitutionality of Tenn.Code.Ann. § 63-8-113(c)(6) in subsequent federal proceedings, should it be necessary for them to do so. Although defendants argue that the plaintiffs waived this right by arguing the constitutional issue in the state court proceedings, the Sixth Circuit has suggested that the law of the case doctrine is not applicable when a state court is informed in advanced that its resolution of a specific issue may be treated as advisory. *See Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 719 (6th Cir. 1994) ("A federal court that certifies a question of state law should not be free to treat the answer as merely advisory unless the state court specifically contemplates that result.") Thus, the court will proceed to the merits of plaintiffs' claims.

B. Scope of Tenn.Code Ann. § 63-8-113(c)(6)

Turning to the merits of plaintiffs' claims, the court must first determine the true scope of prohibition set forth in Tenn.Code Ann. § 63-8-113(c)(6). This determination must be made at the outset of the court's analysis because it affects the purposes, burdens, and benefits that may be ascribed to the statute.

According to the plaintiffs, Tenn.Code Ann. § 63-8-113(c)(6) requires only that they physically separate themselves from the optometrists with whom they contract – even though the statute prohibits optometrists from practicing "in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." In other words, the "in

conjunction with" prohibition has never been given independent meaning and, thus, the statute is satisfied when the optometrist's office is separated from plaintiffs' retail stores by a wall and the optometrist's office has a separate entrance.[15] Defendants, on the other hand, deny that the statute imposes a physical separation requirement alone.

The court agrees with the defendants that physical separation may satisfy that part of the statute that prohibits optometrists from practicing "in" a retail establishment, but the physical separation requirement alone does not satisfy the requirement that optometrists not operate "in conjunction with" such an establishment. On this issue, the Tennessee Supreme Court has determined that "in conjunction with" has independent meaning. *See LensCrafters*, 33 S.W.3d at 779 n.9. ("in conjunction with" is defined to mean being joined together in an association) (citing Black's Law Dictionary 765 (6th ed.1990)).[16] Thus, to satisfy the statute, an optometrist must operate independently of a retail optical establishment, not just occupy a physically separated office.[17]

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[15] Plaintiffs argue that this is the meaning that has long and consistently been ascribed to the statute by the Board of Optometry and that the Board cannot change that interpretation now for tactical advantage. (Docket No. 200 at pp. 32-35)

[16] Because the Tennessee Supreme Court has spoken on the issue, the court rejects plaintiffs' arguments that the Board has consistently construed the statute to require only physical separation and that the Board's construction is binding upon this court. After all, it is Hornbook law that state supreme courts are the final authority on the meaning of state statutes and constitutions. *Cf. Int'l Longshoremen's Assn. v. Davis*, 476 U.S. 380, 387, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986) (court has no authority to review state determinations of purely state law).

[17] Plaintiffs appear to recognize that the Tennessee Supreme Court construed Tenn.Code.Ann. § 63-8-113(c)(6) *to* prohibit optometrists from

(Continued on following page)

C. Equal Protection Clause Challenge

Defendants move for summary judgment on plaintiffs' claim that Tenn.Code.Ann. § 63-8-113(c)(6) violates the Equal Protection Clause. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir.2002). In this case, the challenged legislation is presumed valid if the classification of groups is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. On this issue, defendants correctly argue that the Supreme Court has rejected an equal protection challenge to an Oklahoma statute substantially similar to Tenn.Code Ann. § 63-8-113(c)(6). *See Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955). In that case, the Court stated:

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forming associations with optical retailers at footnote 24 of their Brief in Opposition to Defendants' Motion for Summary Judgment. (Docket No. 200) Although plaintiffs dismiss the Tennessee Supreme Court's construction as *dicta* and argue that such a construction "would prohibit a simple sublease between an optometrist and any landlord whose business is retail," the court finds both arguments without merit. First, the Tennessee Supreme Court's construction of the challenged provision was encompassed within the question certified to it. Second, barring optometrists from forming associations with retail establishments would not prohibit optometrists from leasing space from a retail establishment, unless the lease contained provisions seeking to link the optometrist to the retailer through shared personnel, rental provisions seeking a share of gross receipts, etc.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. State of Texas*, 310 U.S. 141, 60 S. Ct. 879, 84 L. Ed. 1124. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222. The prohibition of the Equal Protection Clause goes no further than invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch.

See Williamson v. Lee Optical, 348 U.S. at 489; *see also Wall v. Hardwick*, 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134 (1974) (affirming *Wall v. American Optometric Ass'n, Inc.*, 379 F. Supp. 175 (N.D.Ga.1974) (3-judge court)).

Plaintiffs acknowledge that "[i]t is certainly true that the Supreme Court upheld a statute similar to the EEP in *Williamson v. Lee Optical*. . . . However, unlike the instant case, there was no evidence that the statute was passed for a protectionist purpose. Here, the evidence is that the purpose of the EEP was to eliminate competition from interstate retailers. This is not a legitimate purpose and the EEP cannot stand." Plaintiffs offer no authority in

support of their argument that a statute may be invalidated under the Equal Protection Clause based upon evidence that the statute was passed for a protectionist purpose. In any event, their evidence of discriminatory motive is weak at best. *Cf. Eastern Ky. Resources v. Fiscal Court of Magoffin Cnty.*, 127 F.3d 532, 543 (6th Cir. 1997). Significantly, defendants have cited legislative history indicating that the Tenn.Code.Ann. § 63-8-113(c)(6) was intended to apply to in-state retail stores leasing space to onsite optometrists, as well as out-of-state retail stores leasing space to onsite optometrists.[18] Accordingly, plaintiffs' Equal Protection Claim will be dismissed.

D. Due Process Challenge

Defendants also move for summary on plaintiffs' claim that Tenn.Code.Ann. § 63-8-113(c)(6) violates substantive due process.[19] The Sixth Circuit has articulated the following framework for analyzing substantive due process claims:

> Substantive due process "serves as a vehicle to limit various aspects of potentially oppressive government action." *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir.1996); *see Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 664-65, 88 L. Ed. 2d 662 (1986). Substantive due process

[18] This evidence does not necessarily undermine plaintiffs' Commerce Clause challenge, as courts routinely reject Equal Protection and Substantive Due Process challenges, while finding violations of the Dormant Commerce Clause. *See, e.g, McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000).

[19] As stated *supra*, the plaintiffs have not moved for summary judgment in their favor on this claim or the Substantive Due Process Claim.

> claims may be loosely divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that "shock the conscience." *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir.1993), cert. denied, 512 U.S. 1237, 114 S. Ct. 2742, 129 L. Ed. 2d 862 *(1994)*; *Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1474 (6th Cir.1993). Where government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301-05, 113 S. Ct. 1439, 1446-49, 123 L. Ed. 2d 1 (1993); *Blue Diamond Coal Co. v. Shalala*, 79 F.3d 516, 521 (6th Cir.1996); *Galas v. McKee*, 801 F.2d 200, 205 (6th Cir.1986).

Valot v. Southeast Local School Dist., 107 F.3d 1220, 1228 (6th Cir. 1997).

Again, the defendants rightfully note that the Supreme Court has twice rejected substantive due process challenges to state statutes substantially similar to Tenn.Code Ann. § 63-8-113(c)(6) on the grounds that such statutes are rationally related to the state's goal of insulating health care professionals from commercial influences. *See Wall v. Hardwick*, 419 U.S. 888; *Williamson v. Lee Optical*, 75 S. Ct. 461 at 466. And, again, the plaintiffs offer no meritorious response. Consequently, this claim, too, will be dismissed.

E. Dormant Commerce Clause Challenge

Both parties move for summary judgment on plaintiffs' claim that the Tenn.Code.Ann. § 63-8-113(c)(6)

impermissibly discriminates against interstate commerce in violation of the Commerce Clause.

The Interstate Commerce Clause vests Congress with the exclusive authority to regulate commerce among the several states. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). The Commerce Clause has a negative or dormant component that the Supreme Court has ruled generally precludes state regulation of or discrimination against interstate commerce. *Welton v. Missouri*, 91 U.S. (1 Otto.) 275, 91 U.S. 275, 23 L. Ed. 347 (1875).

The Supreme Court has created a two-step analysis of dormant commerce clause claims. The first step requires courts to determine whether the challenged action discriminates against interstate commerce. This discrimination may take one of three forms. The challenged statute or action might: (1) facially discriminate against out-of-state goods or services, (2) have a primary purpose of discrimination, or (3) have a discriminatory effect. *See Eastern Ky. Resources*, 127 F.3d at 540. The second step involves determining the correct level of scrutiny applicable to the challenged governmental action. *See id.* If the statute or action by the government discriminates in any of the three ways listed above, reviewing courts will apply the "strictest scrutiny." *Or. Waste Sys., Inc. v. Dept. of Env. Quality of the State of Or.*, 511 U.S. 93, 101, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994).

Plaintiffs bear the initial burden of showing that Tenn.Code.Ann. § 63-8-113(c)(6) has a discriminatory purpose or effect on interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). If the plaintiffs meet that burden, then the government bears the burden of establishing that the

challenged government action "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Or. Waste Sys., Inc.*, 511 U.S. at 101 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)).

If the plaintiffs fail to show that the Tenn.Code.Ann. § 63-8-113(c)(6) discriminates against interstate commerce, the court then must apply the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). In *Pike*, the Supreme Court ruled that nondiscriminatory regulations that only incidentally burden commerce are valid "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142, 90 S. Ct. 844.

1. Whether Tenn.Code Ann. § 63-8-113(c)(6) regulates or affects interstate commerce

In footnote 13 of their Memorandum in Support of Defendants' Motion for Summary Judgment, the defendants assert that Tenn.Code Ann. § 63-8-113(c)(6) "does not regulate, or 'substantially affect,' commerce but rather is an exercise of the state's police power to regulate the practice of optometry, a learned profession." (Docket No. 176) With no citation to factual support in the record or authority so holding, defendants baldly assert a Dormant Commerce Clause challenge cannot be sustained "because the practice of optometry within a retail store has no 'substantial effect' upon commerce." This argument lacks merit. The United States Court of Appeals for the District of Columbia Circuit has upheld federal regulations requiring optometrists to provide their patients with copies of

their prescriptions, *see American Optometric Ass'n v. FTC*, 200 U.S. App. D.C. 32, 626 F.2d 896 (D.C.Cir. 1980), thereby implicitly rejecting the argument that the profession of optometry is exempt from federal commercial regulation. *Cf. Lewis v. BT Investment Mgrs., Inc.*, 447 U.S. 27, 42, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980) ("Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities. Nonetheless, it does not follow that these same activities lack important interstate attributes.").

2. Whether Tenn.Code Ann. § 63-8-113(c)(6) is facially discriminatory

Plaintiffs do not argue that the statute is facially discriminatory. Thus, this is not an issue the court needs to address.

3. Whether Tenn.Code Ann. § 63-8-113(c)(6) has a discriminatory purpose

Plaintiffs argue that the legislative history of the statute and documents obtained from the Tennessee Optometric Association (TOA) demonstrate that the statute was proposed and adopted for the purpose of giving a competitive advantage to Tennessee optometrists who offer optical goods for sale incident to their practice – at the expense of out-of-state competitors such as Sears, Woolworths, etc. Defendants object to the TOA documents as unauthenticated hearsay, an objection that the court has sustained. In addition, defendants note that one of the sponsors of the bill also stated that "an optometrist's customers will not leave him if he moves from Harvey's

Department Store [a locally owned entity] to a professional building." (Docket No. 197 at p. 13) Defendants also argue that the Tennessee Supreme Court has already determined that the statute has a benign purpose.

Plaintiffs' evidence of discriminatory intent is equivocal at best. *See McNeilus Truck & Mfg.*, 226 F.3d at 443 (discussing extrinsic evidence of discriminatory purpose). If anything, the legislative history demonstrates that the proponents of the legislation were concerned with optometrists who practiced in or in conjunction with any retail establishments, regardless of who owned those establishments. Accordingly, no factfinder could reasonably conclude that Tenn.Code Ann. § 63-8-113(c)(6) was adopted for discriminatory purposes. *See Eastern Ky. Resources*, 127 F.3d at 542-43 ("When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute. In this case, EKR has failed to carry its burden.") (internal citations omitted). *See also Reynolds v. Buchholzer*, 87 F.3d 827, 831 (6th Cir. 1996) ("Regarding the statutes at issue, the Ohio Supreme Court has confirmed that the legislative purpose is 'obviously . . . protection and conservation of wildlife, a legitimate state interest.' *State v. Port Clinton Fish Co.*, 538 N.E.2d 1055, 1057, 43 Ohio St. 3d 93. With the deference given to the stated goals of legislation, the plaintiffs would have a difficult time proving that the Ohio legislature was motivated by other ends.").

4. Whether Tenn.Code Ann. § 63-8-113(c)(6) has discriminatory effects

The main point of contention on this issue is whether the statute regulates even-handedly. The thrust of the

defendants' argument is that Tennessee licensed optometrists, who may sell optical goods incident to their practice, are not similarly situated to retail optical goods stores because the former are healthcare providers and the latter are not. In support of this argument, defendants rely primarily upon a Fifth Circuit case, *Ford Motor Co. v. Texas Dept. of Trans.*, 264 F.3d 493 (5th Cir. 2001), which, in turn, relies primarily upon the Supreme Court case of *Exxon Corp v. Maryland*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978).

The Sixth Circuit has interpreted the holding of *Exxon* as follows:

> In *Exxon* the Supreme Court upheld the constitutionality of a Maryland "divestiture" statute that flatly prohibited a producer or refiner of petroleum products from operating any retail gasoline service station within the state. Major oil companies such as Exxon were thus required to divest themselves of their direct retail gasoline operations in the State of Maryland. There did not happen to be any Maryland-based petroleum producers or refiners – a circumstance that made it plausible, to say the least, for Exxon and other major oil companies to argue, as they did, that the statute was unconstitutional because its effect was "to protect in-state independent dealers from out-of-state competition." *Exxon*, 437 U.S. at 125, 98 S. Ct. 2207.
>
> Plausible though the argument may have been, the Supreme Court rejected it. "The fact that the burden of the divestiture requirements falls solely on interstate companies," the Court concluded, " . . . does not lead, either logically or as a practical matter, to a conclusion that the

State is discriminating against interstate commerce at the retail level." *Id.*

The *Exxon* Court pointed out that the Maryland statute created no barriers against competition from interstate independent retailers – which is to say that although local Maryland retailers were being protected against competition from the major integrated oil companies, the local retailers were not being protected against competition from a small number of interstate companies that chose to engage solely in gasoline retailing. This circumstance, in the Court's judgment, "fully distinguished" Exxon from cases such as *Hunt v. Washington Apple Adver. Comm'n.* If any integrated oil companies had been based in Maryland, moreover, they would have been barred from the retail business just as every other producer-refiner was. This was "a most critical factor in Exxon," the Supreme Court subsequently suggested. *See Lewis v. BT Investment Mgrs., Inc.*, 447 U.S. 27, 42, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980) . . .

> . . . *At the very least, it seems to us, Exxon shows a willingness on the part of the Supreme Court to engage in some fairly fine slicing and dicing of the practical effects of state legislation in order to avoid the necessity of finding the legislation discriminatory. Exxon also manifests an obvious reluctance to push cases such as Hunt v. Washington Apple Adver. Comm'n to their logical extremes.*

Maharg, Inc. v. Van Wert Solid Waste Management Dist., 249 F.3d 544, 553-54 (6th Cir. 2001) (emphasis added).

The foregoing passage demonstrates that the Sixth Circuit's reading of the *Exxon* decision is substantially in

accord with the Fourth Circuit's reading of *Exxon* in the *Ford Motor Co.* case. *Compare id.* and *Ford*, 264 F.3d at 500-502. That is *Exxon* requires courts to compare similarly situated entities when considering a claim that a law discriminates against interstate commerce. In this case, the similarly situated entities are optical stores owned by in-state interests and optical stores owned by out-of-state interests. It is beyond dispute that Tenn.Code.Ann. § 63-8-113(c)(6) applies equally to these two entities. The law prohibits optometrists from leasing space inside any optical store, regardless of whether the store is owned by residents or nonresidents.[20]

As the Supreme Court stated in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-88 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987):

> The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37, 100 S. Ct. 2009, 2015-2016, 64 L. Ed. 2d 702 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535-2536, 57 L. Ed. 2d 475 (1978). *See generally* Regan, THE SUPREME

[20] Conversely, any Tennessee licensed optometrist may operate a dispensary incident to an optical practice, regardless of whether that Tennessee licensed optometrist resides in Tennessee, in one of the eight states that border Tennessee, or in any other state. See Tenn.Code.Ann.63-8-115 (Tennessee residency not listed as a requirement to obtain optometry license). For example, a Tennessee licensed optometrist who practices in Clarksville may choose to live across the state line in Kentucky, one who practices in Memphis, across the state line in Arkansas, and one who practices in Chattanooga, across the state line in Georgia.

COURT AND STATE PROTECTIONISM: MAKING SENSE OF THE DORMANT COMMERCE CLAUSE, 84 Mich.L.Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis v. BT Investment Managers, Inc., supra*, 447 U.S., at 36, 100 S. Ct., at 2015. Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, 98 S. Ct. 2207, 2214, 57 L. Ed. 2d 91 (1978). *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-472, 101 S. Ct. 715, 727-728, 66 L. Ed. 2d 659 (1981) (rejecting a claim of discrimination because the challenged statute "regulated evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619, 101 S. Ct. 2946, 2954, 69 L. Ed. 2d 884 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that

> the Act discriminates against interstate commerce.

Such is the case here.

Plaintiffs argue that they are similarly situated with dispensing optometrists nonetheless because they and dispensing optometrists compete in the retail market for the sale of optical goods. They further assert that "there is no reason why the status of Tennessee optometrists as regulated healthcare professionals in treating and diagnosing conditions of the eye should justify extending to them a regulatory monopoly on providing the 'one-stop shopping' for eye examinations that the majority of eyewear customers desire." (Docket No. 200 at p. 8) In support of this argument, plaintiffs note that the Tennessee Supreme Court determined in *LensCrafters* that "the production and sales of ophthalmic lenses and frames does not constitute the delivery of health care." *See Lens Crafters*, 33 S.W.3d at 778.

Plaintiffs, however, ignore the fact that optometrists exert complete control over what happens in their dispensaries and may be held accountable for the operations of their dispensaries and their employees who work there. If a dispensing optometrist's employees disclose a patient's history of venereal disease, a health condition that may be diagnosed in an eye exam and recorded on the patient's chart, the optometrist can discipline or fire that employee. If the dispensing optometrist allows the employees in his dispensary to violate patient confidentiality with abandon, the optometrist can be disciplined. On the other hand, optometrists who merely lease space from a retail optical store cannot control the store's employees or be held accountable for the conduct of those employees.

That there may be valid reasons for allowing optometrists, as regulated medical professionals, to operate dispensaries incident to their practices is underscored by the fact that plaintiffs do not challenge an ophthalmologist's ability to likewise operate a dispensary. Though an optometrist may obtain a different educational degree than an ophthalmologist, the two are equally regulated healthcare professionals, and all of plaintiffs' arguments as to why an optometrist should not be able to operate a dispensary apply equally to an ophthalmologist. Accordingly, the court rejects plaintiffs' argument that plaintiffs and dispensing optometrists must be treated as similarly situated simply because dispensing optometrists are allowed to sell optical goods incident to their practice of optometry and, thus, compete for the same customers as retail optical stores. *Cf. General Motors Corp. v. Tracy*, 519 U.S. 278, 303-04, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997).[21]

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[21] In *Tracey*, the Supreme Court also considered entities that competed in one market but not another. The Court rejected the argument that any competition between the two entities rendered them similarly situated, reasoning that the market in which the two entities competed was not the most significant market. Thus, the Court held:

> In sum, the LDCs' bundled product reflects the demand of a market neither susceptible to competition by the interstate sellers nor likely to be served except by the regulated natural monopolies that have historically supplied its needs. So far as this market is concerned, competition would not be served by eliminating any tax differential as between sellers, and the dormant Commerce Clause has no job to do. There is, however, a further market where the respective sellers of the bundled and unbundled products apparently do compete and may compete further. Thus, the question raised by this case is whether the opportunities for competition between marketers and LDC's in the noncaptive market requires treating marketers and utilities as alike for dormant Commerce Clause purposes. Should we accord

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Because the court has determined that plaintiffs are not similarly situated to dispensing optometrists, the court need not consider plaintiffs' arguments that Tenn.Code.Ann. § 63-8-113(c)(6) discriminates against their business model and that defendants have failed to proffer evidence that the statute is the least discriminatory measure available to serve the purposes of the statute.

5. *Whether Tenn.Code Ann. § 63-8-113(c)(6) satisfies the Pike balancing test*

Under the *Pike* balancing test, the court must determine whether "the burden imposed on [interstate] commerce is clearly excessive to the putative benefits" of the challenged statute. *Pike*, 397 U.S. at 142. Plaintiffs bear the burden of proof on this issue.

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controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities alone operate? Although there is no *a priori* answer, a number of reasons support a decision to give the greater weight to the captive market and the local utilities' singular role in serving it, and hence to treat marketers and LDC's as dissimilar for present purposes. First and most important, we must recognize an obligation to proceed cautiously lest we imperil the delivery by regulated LDC's of bundled gas to the noncompetitive captive market. Second, as a Court we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market. Finally, should intervention by the National Government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and captive markets.

519 U.S. at 303-04. The Court's reasoning is equally applicable to this case.

Generally speaking, the state asserts that the Tenn.Code.Ann. § 63-8-113(c)(6) "prevent[s] the control of optometrists, who are licensed healthcare professionals, by unlicensed, nonhealthcare persons or entities," such as the plaintiffs. (Docket No. 176 at p. 3). Plaintiffs, on the other hand, assert that the statute imposes the following burdens upon out-of-state optical firms such as themselves: (1) "construction costs and increased rent" associated with building and maintaining two-door stores; (2) "lost revenue associated with being unable to offer one-stop eyewear, a convenience customers prefer and good patient care demands, and that their primary competitors can and do offer;" (3) "barriers to market penetration because out-of-state optical firms cannot find suitable store locations;" and (4) "the barrier to market entry because out-of-state optical firms cannot do business in Tennessee at all." (Docket Nos. 200 at pp. 37-38, 164 at pp. 12-15) Plaintiffs assert that "the magnitude of these burdens is in the tens of thousands of dollars per year per store." (Docket No. 200 at p. 38) (emphasis in original). First, the specific burdens identified by the plaintiffs will be addressed and then, the putative benefits proffered by the defendants.

Plaintiffs first assert that they incur substantial capital and operating costs as a result of complying with the prohibition against optometric practice in a retail establishment. For instance, plaintiffs have to build out and lease more space and are unable to obtain economies of scale if they wish for their customers to have convenient access to optometrists and the eye exams that they provide. But these same costs are imposed upon any optical store wishing to operate in the state of Tennessee, whether it is owned by an in-state or an out-of-state interest. Moreover, plaintiffs can obtain economies of scale only by

engaging in the very practices the act without doubt was designed to prohibit, such as the sharing of personnel and coordination of advertising between the optometrist and optical store. Such practices can rationally be expected to compromise the optometrist's ability to control his or her staff and the advertising of his or her professional services.

Indeed, the plaintiffs' own evidence supports such a conclusion. For example, under Wal-Mart's leases with its optometrists, Wal-Mart is responsible for hiring, firing, and supervising all of the employees who assist the optometrist. (Docket No. 202 at p. 190) In addition, leases between two of the plaintiffs and the optometrists to whom they lease respectively provide that "[a] portion of Tenant's rent is utilized by Landlord as payment for advertising by Landlord of the availability of Tenant's services. Advertising by Landlord is solely within the discretion of Landlord" and "Landlord may, in its sole discretion, advertise the availability of Tenant's services." (Docket No. 202 at p. 45)[22]

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[22] On a related note, plaintiffs maintain that "interstate optical firms have an economic incentive to offer quality goods and services because their business model depends heavily on having a good reputation. Reputation is a form of economic investment." But the Supreme Court has specifically held that "the Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp.*, 481 U.S. at 92. And, like the Supreme Court, this court is "not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation.'" *Id.* (*quoting Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679, 67 L. Ed. 2d 580, 101 S. Ct. 1309,1321 (Brennan, J., concurring in judgment)). Thus, the possibility that some optical firms may seek to interfere with the practice of optometrists to whom they lease space is enough. *See id.* ("In our view, the possibility of coercion in some takeover bids offers additional

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As for plaintiffs' claims to lost revenue, plaintiffs offer some evidence that LensCrafters and Pearle Vision stores located in states with restrictions similar to Tennessee's, bring in monthly gross revenues that are, on average, $12,000 and $8,000, lower than similar stores located in states with no such restriction. Significantly, plaintiffs proffer no evidence on whether Tennessee stores are any more or less *profitable* than stores in states that allow optometrists to sublease space inside retail optical stores. In any event, the regression analysis completed by Dr. Rubinstein produced an R factor of only .03. Thus, the restrictions imposed by Tenn.Code.Ann. § 63-8-113(c)(6) account for only a portion of the differences in revenue. Moreover, it may be that LensCrafters and Pearle are losing revenues in Tennessee to out-of-state chains such as Wal-Mart, rather than to dispensing optometrists.

The last two burdens identified by the plaintiffs, barriers to market penetration and to market entry by certain optical stores, are easily dispensed with because they were rejected in *Exxon*.[23] *See Exxon*, 437 U.S. at 127. The Court's analysis on this issue is as follows:

> Appellants argue, however, that this fact does show that the Maryland statute impermissibly burdens interstate commerce. They point to evidence in the record which indicates that, because of the divestiture requirements, at least

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justification for Indiana's decision to promote the autonomy of independent shareholders.")

[23] Plaintiffs also assert that there can be no benefit to the statute because the Executive Director of the Tennessee Optometric Association testified that the organization took no position on the merits of the legislation. As defendants point out, however, Mr. Odom was not deposed as a corporate representative.

> three refiners will stop selling in Maryland, and which also supports their claim that the elimination of company-operated stations will deprive the consumer of certain special services. Even if we assume the truth of both assertions, neither warrants a finding that the statute impermissibly burdens interstate commerce.
>
> Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

Here, too, there is no reason to expect that the loss of an America's Best or a J.C. Penney Optical store will not be made up for by the opening of a LensCrafters or Pearle Vision store.

Finally, it must be observed that plaintiffs fail to put forth any real argument that the statute impedes the flow of optical wear into the state of Tennessee.[24] *See Exxon*, 437 U.S. at 127-28 ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a

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[24] The absence of such argument and evidence is puzzling, since the cases upon which the plaintiffs principally rely [sic] involved regulations which threatened to impede the flow of interstate goods into the regulating state or imposed geographically based restrictions. Without such persuasive argument, these cases become inapposite.

retail market. As indicated by the Court in *Hughes*, the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.") (internal citation omitted). *Cf. McNeilus Truck & Mfg.*, 226 F.3d at 442 ("The statute at issue here definitely threatens to slow the flow of out-of-state remanufactured vehicles into Ohio, an effect that distinguishes the statute from others that have been upheld under dormant-Commerce-Clause analysis.")

The best plaintiffs offer in their briefs is a footnote stating that, "in addition, fewer goods move in commerce, because – as the FTC recognized – the more accessible eyecare is, the more people obtain it. Thus, this case does not involve merely a transfer of eyewear dollars – albeit from out-of-state to in-state entities – but effects a barrier to the import of eyewear into Tennessee." (Docket No. 200 at p. 6 n.5) And, in his expert report, plaintiff's economic expert, Dr. Rubinfeld, merely states:

> The Eye Exam Prohibition imposes burdens on interstate optical firms that are not also imposed on dispensing optometrists, their in-state competitors. . . . One would expect that these burdens would lead to lower unit sales and lower revenues for interstate optical firms. The evidence supports each of these predictions and the resulting impact on interstate commerce, including a decrease in the flow of eyeglasses or their components into the state of Tennessee.

(Docket No. 163, Ex. 2 at p. 31).

However, Dr. Rubinfeld's conclusion appears to be based upon the assertion that Tenn.Code.Ann. § 63-8-113(c)(6) increases the costs of eyecare and eyewear and, thus, decreases demand. Such reasoning has been rejected

by the Supreme Court. *See Exxon Corp*, 437 U.S. at 127-28 ("It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce."). *Accord Georgia Manufactured Housing Ass'n, Inc. v. Spalding County, Ga.*, 148 F.3d 1304, 1308 (11th Cir. 1998) ("resulting price increases of manufactured homes do not weigh heavily against the 4:12 requirement because price increases generally do not violate the dormant Commerce Clause").

And the evidence in the record does not support the conclusion that dispensing optometrists are any less likely to import their optical goods than out-of-state optical stores. The court notes, for example, that Dr. Richt purchases frames through a buying group in Mississippi in order to take advantage of volume discounts offered by the frame manufacturers. (Docket No. 202 at p. 89) Some dispensing optometrists may prefer to grind and finish their eyeglass lenses in-house, but plaintiff LensCrafters does as well. Finally, there is no evidence that, when it comes to grinding and finishing lenses, the net effect of the statute is to decrease interstate commerce. In sum, the court finds no evidence that Tenn.Code.Ann. § 63-8-113(c)(6) unconstitutionally impedes the flow of optical goods into the state of Tennessee. *Cf. Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 429-30, 83 S. Ct. 1759, 1763, 10 L. Ed. 2d 983 (1963)[25]

[25] In *Head*, the Court considered the validity of a New Mexico statute forbidding optometrists from advertising their services. The law was challenged by a Texas optometrist who wished to advertise his

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Turning to the putative benefits of the statute, plaintiffs devote a substantial amount of their argument and proof to disputing whether Tenn.Code.Ann. § 63-8-113(c)(6) serves to insulate optometrists from commercial influence or benefits consumers in any manner. (Docket Nos. 164 at pp. 27-36, 200 at pp. 13-31) They further argue that defendants have failed to identify any benefits that could not as easily be served by less discriminatory measures. (Docket Nos. 200 at pp. 36-37)

Plaintiffs first argue that the purposes advanced by the legislature – to upgrade the profession and avoid commercial interference with the doctor-patient relationship – have been abandoned or are unsubstantiated. In the first instance, the court does not consider the goal of "upgrading the profession" a separate rationale, but

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services in New Mexico newspapers. In upholding the validity of the law, the Court stated:

> A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co. v. City of Detroit, supra,* 362 U.S., at 448, 80 S. Ct., at 818.

374 U.S. at 429.

Significantly, the Court further stated:

> Like the smoke abatement ordinance in the *Huron* case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. *The legitimacy of state legislation in this precise area has been expressly established. Williamson v. Lee Optical Co.,* 348 U.S. *429, 483, 75 S. Ct. 461, 99 L. Ed. 563.

Id. (emphasis added).

simply one aspect of isolating optometric practice from commercial influence. With respect to this issue, it may be true that optometrists are possessed of the same skills and experience regardless of where they practice. However, that does not negate the fact that an optometrist's professional judgment may be compromised when he associates himself with a commercial entity. For instance, the lease that Eye Clinic 20/20, Inc., entered into with one of its optometrists: (1) guarantees an annual income of $75,000; (2) requires him to schedule patients every 15 minutes; (3) requires him to accept exam fees established by Eye Clinic 20/20; (4) requires him to recommend UV protection, progressives, anti-reflective coating, polarization, and all state-of-the-art products to every applicable patient without regard to cost; (5) requires him to recommend premium products without regard to the patient's ability to pay for such products; and (6) requires him to permit Eye Clinic 20/20 to advertise his services. (Docket No. 202 at p. 63)

This brings the court to plaintiffs' second attack on the asserted benefits of the statute, that the history of non-enforcement undercuts any contention of legitimate purpose. On this issue, plaintiffs note that the Board has not taken any action on the Eye Clinic 20/20 lease described above or on numerous other leases that impose restrictions upon optometrists. Nor has the Board consistently found a violation of Tenn.Code.Ann. § 63-8-113(c)(6) when the optometrist's office was accessed through an optical store.

The court can see no basis for finding that the avowed benefits of a statute duly enacted by the legislature may be undermined by poor enforcement on the part of the executive branch. If such were the case, the executive

branch would be in a position to invalidate any law with which it disagreed. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 755, 121 S. Ct. 1808, 1817, 149 L. Ed. 2d 968 (2001); *Heckler v. Community Health Svcs. of Crawford Cty., Inc.*, 467 U.S. 51, 60, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.").[26]

It is for this same reason that the court also must reject the plaintiffs' arguments that the purported benefits of the statute are undermined by the fact that the state Attorney General did not believe that there was any benefit to prohibiting optometrists from leasing space inside of retail optical stores, and Board members were unable to identify or agree on the purpose of the prohibition.

Plaintiffs' next critique of the purported benefits of the statute is that those benefits are not advanced "by a wall separating the optometrist from the optical dispensary." (Docket No. 164 at p. 33) As stated *supra*, the Tennessee Supreme Court has determined that Tenn.Code.Ann. § 63-8-113(c)(6) prohibits optometrists not only from operating in retail stores but also from practicing "in conjunction with" retail stores. Thus, there is no merit to the argument

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[26] The Board also may be reluctant to initiate any measures to enforce Tenn.Code.Ann. § 63-8-113(c)(6) during the pendency of this lawsuit due to uncertainty about the legality of their actions.

that the statute may be satisfied merely by erecting a wall between the optometrist's office and the optical store.

As for plaintiffs' challenges to the specific harms identified by the defendants (Docket No. 200 at pp. 19-31), the criticisms leveled amount only to assertions that these harms do not really affect patient care; that patient confidentiality is not that important; that optometrists do not really need to dilate a patient's eyes; that it is perfectly acceptable for an optical store to dictate the number of hours than an optometrist's office shall be open as long as the optometrist can meet the requirement by hiring another optometrist; that it is no problem for an optical store to ask an optometrist to modify his prescription to fit the merchandise in stock; and that a consumer's confusion about the business relationship between an optometrist and the optical retail store from which he subleases space is an insignificant concern. In fact, the weakness of these assertions well illustrates the problem of lay persons or entities making decisions about what constitutes proper medical practice.[27]

Regardless of the plaintiffs' critique of the putative benefits of the challenged statute, the state is under no onerous duty to proffer evidence documenting that the benefits actually and demonstrably flow from Tenn.Code.Ann. § 63-8-113(c)(6). *See Ford*, 264 F.3d at 503 ("Consistent with the use of the term 'putative' in the *Pike*

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[27] It may be that managed care also allows lay persons to interfere with the delivery of health care. But the Supreme Court "has made clear that a legislature need not strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981) (internal citation and quotation marks omitted).

balancing [test], this Court will not 'second guess the empirical judgment of lawmakers concerning the utility of legislation.'") (quoting *CTS Corp.*, 481 U.S. at 92, 107 S. Ct. 1637). As Justice Brennan explained in his concurring opinion in *Kassel*:

> In determining those benefits, a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment. Since the court must confine its analysis to the purposes the lawmakers had for maintaining the regulation, the only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes. It is not the function of the court to decide whether in fact the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.

450 U.S. at 680-81 (citations omitted). Here the state's interest in restricting commercial interference with the conduct of a medical professional is an indisputably legitimate exercise of its police power, which has been historically recognized by the courts. Indeed, the Supreme Court repeatedly has held that states are empowered, under their police power, to prescribe the qualifications of who may practice medicine, using that term in its broadest sense to include all the healing arts, and the conditions under which they may do so. *See, e.g., North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973) (requirement that pharmacists own controlling interest in pharmacy); *Head*, 374

U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (restrictions on advertising of optometry services); *Williamson*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (prohibiting opticians from filling lenses without written prescription of optometrist or ophthalmologist); *Douglas v. Noble*, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923) (licensing dentists); *McNaughton v. Johnson*, 242 U.S. 344, 37 S. Ct. 178, 61 L. Ed. 352 (1917) (excluding ophthalmologists from optometry); *Collins v. Texas*, 223 U.S. 288, 32 S. Ct. 286, 56 L. Ed. 439 (1912) (licensing osteopaths).

The court is mindful, however, that in conducting the *Pike* balancing test, the state's invocation of an health or safety purpose does not insulate a state law from Commerce Clause attack. *See Kassel*, 450 U.S. at 670. Rather the court must give "sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.* (internal citations and quotation marks omitted). Applying that dictate to the circumstances of this case, the court simply cannot conclude that the burdens imposed by Tenn.Code.Ann. § 63-8-113(c)(6) clearly exceed the statute's putative benefits. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981) ("A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause."); *Scariano v. Justices of Supreme Court of State of Ind.*, 38 F.3d 920, 924 (7th Cir. 1994) (courts should treat state efforts to preserve professional integrity with deference).

The statute may serve its ends imperfectly and may be unwise in some or many respects, but it is not an unconstitutional infringement on interstate commerce.

IV. CONCLUSION

For the foregoing reasons, defendants' Motion for Summary Judgment (Docket No. 176) will be granted, and plaintiffs' Motion for Summary Judgment (Docket No. 164) will be denied.

In addition, plaintiffs' Motion to Supplement the Record (Docket 212) will be denied, and defendants' Motion for Relief from Local Rule 8(b)(7) (Docket No. 209) will be granted, while defendants' Motion to Strike (Docket No. 209) will be denied. Because defendants' Motion for Summary Judgment disposes of all claims, defendants' Motion for Advisory Jury (Docket No. 179) will be denied as moot, as will plaintiffs' Motion for a Status Conference (Docket No. 216).

An appropriate Order shall Enter.

Enter this 15th day of January, 2003.

ALETA A. TRAUGER
United States District Judge

APPENDIX C

LENSCRAFTERS, INCORPORATED, Plaintiff, v. KENNETH S. ROBINSON, in his Official capacity as Commissioner of the Tennessee Department of Health, et al., Defendants. CONSOLIDATED WITH U.S. VISION, COLE VISION CORPORATION, and NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS, v. KENNETH S. ROBINSON, in his Official capacity as Commissioner of the Tennessee Department of Health, et al , Defendants.

Case No. 3:98-0150 CONSOLIDATED WITH Case No. 3:00-0096

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

JUDGES: ALETA A. TRAUGER, United States District Judge. MAGISTRATE JUDGE GRIFFIN.

JURY DEMAND

MEMORANDUM and ORDER

Pending before the court is the plaintiffs' Motion to Alter or Amend (Docket No. 224), to which the defendants have responded (Docket No. 226) and plaintiffs have replied (Docket No. 228).

Analysis

Plaintiffs argue that the court erred in finding Exhibits 73, 74, 75, and 76 to plaintiffs' Motion for Summary Judgment to be inadmissible evidence. Plaintiffs further argue that this evidence establishes that Tenn.Code.Ann.

§ 63-8-113(c)(6) was enacted for the purpose of benefitting in-state economic interests, in violation of the Dormant Commerce Clause. Defendants counter that these exhibits were rightfully excluded as unauthenticated hearsay. Alternatively, defendants argue that, even if these Exhibits are deemed admissible, they fail to establish that Tenn.Code.Ann. § 63-8-113(c)(6) was enacted for discriminatory purposes.

Upon review of the parties' arguments and the exhibits at issue, the court concludes that Exhibits 73, 74, 75, and 76 are admissible as ancient documents under Fed.R.Evid. 803(16)[1] and 901(b)(8)[2]. These exhibits are more than 20 years old and were produced in response to a subpoena issued to the Tennessee Optometric Association. Thus, they indisputably satisfy the second and third requirements for authentication under Fed.R.Evid. 901(b)(8). The only contested issue as to authentication under the ancient documents provision is whether these exhibits are "in such condition as to create no suspicion concerning authenticity." With respect to this issue, defendants argue that the exhibits do not appear to be final, approved minutes or correspondence because none of the exhibits are signed, that there are handwritten corrections on some of the exhibits, and that there appear to be

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[1] Fed.R.Evid. 803(16) provides that "[s]tatements in a document in existence twenty years or more the authenticity of which is established" are not excluded by the hearsay rule, even though the declarant is available as a witness.

[2] Fed.R.Evid. 901(b)(8) provides for authentication where there is "[e]vidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered."

pages missing from some of the exhibits. However, these challenges are best directed at the weight to be accorded to the documents by the factfinder, rather than whether the exhibits should be admitted in the first instance. *See Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 661 (6th Cir. 2000); *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1375-76 (3d Cir. 1991). Accordingly, the court finds that the plaintiffs have made a *prima facie* showing that Exhibits 73, 74, 75, and 76 also satisfy the first requirement for authentication as ancient documents. Turning to the issue of hearsay, Fed.R.Civ.P. 803(16) provides that statements contained in an ancient document are not hearsay. Therefore, defendants' hearsay challenge is without merit.[3]

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[3] The Advisory Committee Notes summarize the rationale for excepting statements in ancient documents from the hearsay rule as follows:

> Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. Id. § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 id. § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. *See Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir.1961), upholding admissibility of 58-year-old

(Continued on following page)

Although Exhibits 73, 74, 75, and 76 are admissible, the court is not persuaded that these exhibits establish that Tenn.Code.Ann. § 63-8-113(c)(6) was enacted for discriminatory purposes. At best, these exhibits provide evidence that the Tennessee legislature was concerned about dangers of optometrists practicing in, or in conjunction with, any commercial entity, regardless of in-state or out-of-state ownership. It is worth noting that this concern was recognized as legitimate by the United States Supreme Court in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491, 75 S. Ct. 461, 466, 99 L. Ed. 563 (1955), some ten years before Tenn.Code.Ann. § 63-8-113(c)(6) was adopted. In any event, plaintiffs have failed to establish how the activities of the TOA summarized in the exhibits impacted the legislative process so as to produce a discriminatory statute. *See Eastern Ky. Resources*, 127 F.3d 532 at 542-43 ("When a party seeks to present circumstantial evidence of discriminatory purpose pursuant to a dormant Commerce Clause challenge, it is the duty of that party to show the effect of that evidence on the challenged statute.") (internal citations omitted). *See also Reynolds v. Buchholzer*, 87 F.3d 827, 831 (6th Cir. 1996) ("Regarding the statutes at issue, the Ohio Supreme Court has confirmed that the legislative purpose is '[o]bviously . . . protection and conservation of wildlife, a legitimate state interest.' *Port Clinton Fish Co.*, 538 N.E.2d 1055 at 1057. With the deference given to the stated goals of legislation, the plaintiffs would have a difficult time proving that the Ohio legislature was motivated by other ends."). Accordingly, admission of Exhibits 73, 74, 75, and 76 provides no

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newspaper story. *Cf.* Morgan, Basic Problems of Evidence 364 (1962), *but see id.* 254.

basis for altering the court's conclusion that the defendants are entitled to judgment as a matter of law on plaintiffs' Dormant Commerce Clause claims.

Conclusion

Plaintiffs' Motion to Alter or Amend (Docket No. 224) is GRANTED in part and DENIED in part. The Court's judgment of January 15, 2003 (Docket Nos. 220, 221) is amended to provide that Exhibits 73, 74, 75, and 76 to plaintiff's Motion for Summary Judgment are admissible. Because these documents do no [sic] alter the court's conclusion that defendants are entitled to judgment as a matter of law on plaintiffs' Dormant Commerce Clause claims, plaintiffs' Motion to Alter or Amend is denied in all other respects. This constitutes the final Order in this case.

It is so ORDERED.

ENTER this 24th day of February, 2003.

ALETA A. TRAUGER

United States District Judge

APPENDIX D

LENSCRAFTERS, INC. v. DON SUNDQUIST, in his official capacity as Governor of the State of Tennessee, et al.

SUPREME COURT OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

Certified Question from the United States District Court for the Middle District of Tennessee No. 3:98-0150 Aleta Trauger, Judge

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No. M1999-01349-SC-R23-CQ – Filed December 13, 2000

This case is before the Court on a certified question from the United States District Court for the Middle District of Tennessee.[1] The moving party, LensCrafters, Inc., (LensCrafters) owns optical stores throughout the United States and produces prescription ophthalmic materials on its premises. LensCrafters leases space to licensed optometrists who perform eye examinations. Prescription lenses and frames are then made and fitted,

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[1] Tenn. Sup. Ct. R. 23 provides:

> The Supreme Court may, at its discretion, answer questions certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

all in furtherance of the concept of "one-stop shopping." LensCrafters sued in the district court to challenge the constitutionality of Tenn. Code Ann. § 63-8-113(c)(6) (1997). This statute defines as unlawful and thus prohibits optometrists from:

> [practicing] or [offering] to practice optometry in, or in conjunction with, any *retail store or other commercial establishment* where merchandise is displayed or offered for sale.

(Emphasis added.) The question certified to us by the district court is whether an entity engaged primarily in the business of selling eyeglasses and frames is a retail store or other commercial establishment as defined by the above-quoted statute. We accept the certified question and answer that such entities are "retail stores or other commercial establishments" as statutorily defined.

Tenn. Sup. Ct. R. 23 Certification of Questions of State Law from Federal Court.

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., FRANK F. DROWOTA, III, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined.

Barbara J. Moss, Nashville, Tennessee, for the movant, LensCrafters, Inc.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Michelle Hohnke Joss, Assistant Attorney General, for the Respondent, Don Sundquist, in his official capacity as Governor of the State of Tennessee, et al.

OPINION

I. Facts and Procedural History

LensCrafters is an Ohio corporation which owns numerous optical superstores throughout the United States. LensCrafters sells prescription ophthalmic lenses and frames on its premises and employs dispensing opticians[2] to produce these materials. In addition, LensCrafters leases space at its stores to licensed Tennessee optometrists[3]

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[2] Under the Tennessee statutes governing opticians, the term "dispensing opticians" is used in two separate contexts that may seem confusing at first glance. The statute (and this opinion) refers to "dispensing opticians" and also to businesses "in the practice of dispensing opticians." A "dispensing optician" is an optician who engages in the "preparation, adaptation and dispensing of lenses, spectacles, eye glasses and optical devices to the intended user thereof on the written prescription of a physician or optometrist." Tenn. Code Ann. § 63-14-102 (1997 Repl.). Like other opticians, dispensing opticians may not "examine or exercise eyes," nor may they "diagnose, treat, correct, relieve, operate, or prescribe for any human ailment." *Id.* § 63-14-102(2). However, dispensing opticians are allowed to fit contact lenses "in the presence of and under the direct supervision of a licensed optometrist or ophthalmologist." *Id.*

In turn, the "preparation, adaptation and dispensing of lenses, spectacles, eye glasses, and optical devices" is referred to as the "practice of dispensing opticians." *See, e.g., id.* § 63-14-103(d). Thus, when we refer to businesses "in the practice of dispensing opticians," we are referring to businesses that perform the services provided by dispensing opticians.

[3] Optometrists are allowed to conduct eye examinations "for the purpose of ascertaining defects of vision or muscular anomalies or other abnormal conditions of the eyes," and they are also allowed to prescribe "ophthalmic lenses or prisms to remedy or relieve defects of vision or muscular anomalies." Tenn. Code Ann. § 63-8-102(12)(A)-(B) (1997 Repl.). Optometrists may also supply, replace, or duplicate an ophthalmic lens or frame. *Id.* § 63-8-102(12)(D). However, unlike ophthalmologists, optometrists are not licensed physicians. Instead, optometrists in Tennessee, as in other states, are separately licensed and regulated by a Board of Optometry. *See Id.* § 63-8-112.

so that customers may obtain eye examinations and have prescription eyeglasses made at the same location.

In April 1997, the Tennessee Board of Optometry (Board) sanctioned Jeffery A. Rothman, O.D., an optometrist who leased space from LensCrafters. The Board found that Rothman had violated Tenn. Code Ann. § 63-8-113(c)(6) (1997), which prohibits optometrists from practicing "in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." The Board, in addition to imposing a $1,000 fine, ordered Rothman to close his practice within thirty days unless he were to accomplish the following: (1) install closable, lockable doors separating his leased space from LensCrafters; (2) provide a separate entrance from the outdoors to his space; and (3) provide a waiting-room area near the separate entrance. Rothman petitioned for chancery court review pursuant to Tenn. Code Ann. § 4-5-322 (1997).

While review was pending, LensCrafters brought suit in the United States District Court for the Middle District of Tennessee against Don Sundquist, in his official capacity as Governor of the State of Tennessee, and the members of the Tennessee Board of Optometry, in their official capacities. In that suit, LensCrafters challenged the constitutionality of Tenn. Code Ann. § 63-8-113(c)(6), contending that the statute violates the Dormant Commerce Clause, the Equal Protection Clause, and the Due Process Clause of the United States Constitution because it allows businesses owned by Tennessee-licensed optometrists to sell optical products and conduct eye examinations in the same location but does not allow out-of-state-owned retail establishments to do so. Upon the defendants' motion for summary judgment, however, the parties

agreed that if Tenn. Code Ann. § 63-8-113(c)(6) were interpreted to exclude entities engaged primarily in the business of selling and dispensing ophthalmic lenses and frames from the definition of "retail store or other commercial establishment," then it would be unnecessary to reach the constitutional issues that LensCrafters had raised. To resolve this issue, the district court certified the following question for our determination:

> Whether an entity engaged primarily in the business of selling and dispensing ophthalmic lenses and frames is a "retail store or other commercial establishment" within the meaning of Tenn. Code Ann. § 63-8-113(c)(6)?

We accepted this question for review and now respond that such an entity is a retail store under the statute.

II. Analysis

The parties in this case contend that this Court should interpret Tenn. Code Ann. § 63-8-113(c)(6) to exclude businesses which sell ophthalmic lenses and frames because a contrary interpretation would render the statute unconstitutional.[4] They contend that the restriction against practicing in or in conjunction with a retail store discriminates against out-of-state stores, thereby unduly burdening interstate commerce.[5] We begin by discussing the constitutional aspects of the parties' construction of the statute.

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[4] In reviewing a statute for a possible constitutional infirmity, we are "required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute." *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995).

[5] *See generally* U.S. Const. art. I, § 8, cl. 3.

The states are allowed great leeway under their police power to adopt regulations that protect the health and safety of their citizens. Although the Constitution confers "upon Congress the regulation of commerce, . . . [it was] never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 443, 80 S. Ct. 813, 816, 4 L. Ed. 2d 852 (1960), *quoted in Head v. New Mexico Bd. of Exam. in Optometry,* 374 U.S. 424, 428, 83 S. Ct. 1759, 1762, 10 L. Ed. 2d 983 (1963). Although regulations adopted under the police power may indirectly impose a burden on interstate commerce, they are not unconstitutional unless they are shown to "discriminate against interstate commerce or operate to disrupt its required uniformity." *Huron Portland Cement Co.,* 362 U.S. at 448, 80 S. Ct. at 818.

The statutory regulations on optometry[6] pertinent here in effect insulate optometrists from non-health care commercial entities. The purpose of this insulation is to

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[6] The laws providing for the establishment of the Tennessee Board of Optometry and the standards governing optometrists are found in Tenn. Code Ann. §§ 63-8-101 through 63-8-133 (1997 & Supp. 1999). The statutes provide for the examination and licensing of optometrists, prohibit the unauthorized practice of optometry, and place restrictions on those licensed to practice. These restrictions include prohibitions against engaging in the practice of optometry as an "employee of any person, or business or organization not engaged primarily in health care delivery," dividing fees or agreeing to "split or divide the fees received for professional services with any person for bringing or referring a patient," and the prohibition in this case, practicing "in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." Tenn. Code Ann. §§ 63-8-113(c)(2), (5), & (6); 63-8-120(a)(13) & (14) (1997 Repl.).

prohibit the formulation of business relationships between optometrists and such entities. The policy supporting such prohibitions is that preservation of an unbroken relationship between the professional and the patient is best achieved by shielding the professional from the risk of control by an unlicenced person or entity. *See Cole Vision v. Dept. of Bus. and Prof.*, 688 So. 2d 404, 409 (Fla. Dist. Ct. App. 1997).

A review of analogous precedent shows that regulations prohibiting optometrists from practicing optometry as a servant of an unlicensed optical business, though affecting interstate commerce, have been held to be constitutional. *See Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Examr's in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (Ga. 1963); *Sears, Roebuck & Co. v. State Bd. of Optometry*, 213 Miss. 710, 57 So. 2d 726 (Miss. 1952); *see also* 61 Am. Jur. 2d *Physicians, Surgeons, etc.* § 157 (1981); 88 ALR 2d 1290, 1294 § 3[a]. In upholding the constitutionality of a statute prohibiting those "engaged in the business of retailing merchandise" from renting out space for eye examinations, the United States Supreme Court stated:

> It seems to us that this regulation . . . is an attempt to free the profession, to as great an extent as possible, from all taints of commercialism. It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment. In any case, the opportunity for that nexus may be too great for safety, if the eye doctor is allowed inside the retail store. Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location

> may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491, 75 S. Ct. 461, 466, 99 L. Ed. 563 (1955). Our Court has stated similar concerns justifying such regulations when addressing the question of optometrists being employed by corporations:

> The logical result would be that corporations and business partnerships might practice law, medicine, dentistry or any other profession by the simple expedient of employing licensed agents. And if this were permitted professional standards would be practically destroyed, and professions requiring special training would be commercialized, to the public detriment. The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character.

State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 225 S.W.2d 263, 269 (Tenn. 1949).[7]

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[7] Notably, *Loser* was decided in 1949, prior to the enactment of Tenn. Code Ann. § 48-248-101 *et seq.*, which allows the creation of Professional Limited Liability Companies (PLLC), and the enactment of Tenn. Code Ann. § 48-101-601 *et seq.*, which allows the creation of

(Continued on following page)

We conclude that even were the statute to prohibit the practice of optometry in LensCrafters's stores, it would still be constitutional. Therefore, our construction of the statute is not affected by constitutional concerns. Rather, we are aided by a consideration of the intent of the legislature in its enactment. Indeed, to ascertain and give effect to the intention and purpose of the legislature is the basic rule of statutory construction. *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977). This "[l]egislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." *Carson Creek Vacation Resorts, Inc. v. State Dept. of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). In determining legislative intent, statutes relating to the same subject or sharing a common purpose must be construed together ("*in pari materia*") "in order to advance their common purpose or intent." *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997). Ultimately, we must seek the most "reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws." *Id.*; *see also Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995).

Professional Corporations (PC). These statutes have been widely used by professionals, including optometrists, to allow them to practice as business associations. However, the PLLC and PC statutes have no impact on our decision. The *Loser* Court's concern was with the unlicensed practice of learned professions by business associations, a concern which does not apply if the business association is under the exclusive control of licensed professionals. *Cf. Loser*, 225 S.W.2d at 269. Thus, we do not mean to imply that licensed optometrists should be prohibited from forming PLLCs or PCs under which to conduct their practice.

Here, the natural and ordinary meaning of the language used, "any retail store . . . where merchandise is . . . offered for sale," would include ophthalmic superstores such as LensCrafters. The parties maintain, despite the absence of language exempting ophthalmic stores, that the intent of our legislature in enacting the provision before us was to prevent optometrists from practicing in department stores and not stores which specialize in selling ophthalmic supplies.

To support their assertion that applying Tenn. Code Ann. § 63-8-113 to ophthalmic stores would be inconsistent with the statutory scheme considered as a whole, the parties point to sections of our Code which suggest an "overlap" between the work of dispensing opticians and optometrists. The parties note that LensCrafters is a business "in the practice of dispensing opticians" under Tenn. Code Ann. § 63-14-102 and thus is allowed to prepare, adapt, and dispense lenses, spectacles, eye glasses, frames, and optical devices. They further note that opticians are permitted to practice as employees of businesses "in the practice of dispensing opticians" if they are "under the actual and personal supervision of partners, officers, managers or stockholders who possess valid unrevoked licenses as dispensing opticians entitled to practice in [Tennessee]." *See* Tenn. Code Ann. § 63-14-103(d) (1997). Thus, LensCrafters may sell ophthalmic lenses and frames and may employ opticians who dispense ophthalmic lenses and frames.

Likewise, the parties note that optometrists are permitted to employ dispensing opticians. *Id.* § 63-14-105 ("Nothing contained in this chapter shall be construed to prohibit a . . . licensed optometrist from employing a licensed dispensing optician as defined in this chapter.").

Moreover, they note that selling glasses has long been a part of the practice of optometry and that the statutory scheme contemplates that optometrists should be allowed to sell ophthalmic lenses and frames. *See id.* § 63-8-102(12)(D). Thus, like businesses "in the practice of dispensing opticians," optometrists also may hire opticians to sell and dispense ophthalmic lenses and frames.

The basic thrust of the parties' argument is that the statutes governing opticians and optometrists are inconsistent because they allow a business "in the practice of dispensing opticians" to hire dispensing opticians and sell ophthalmic products, and they allow an optometrist to hire dispensing opticians and sell ophthalmic products, but they do not allow a business "in the practice of dispensing opticians" to form a business association with an optometrist. The parties contend that the similarities between optometrists and businesses "in the practice of dispensing opticians" render unjustifiable any argument that relationships between such businesses and optometrists would degrade the profession of optometry.

The parties fail, however, to recognize that allowing optometrists to practice in conjunction with businesses "in the practice of dispensing opticians" may involve a compromise of the optometrists' professional autonomy. Such does not occur when an optometrist operates an independent business which employs opticians to dispense and sell ophthalmic lenses and frames. *Cf.* Tenn. Code Ann. § 63-8-113(c)(2), (5) (1997 Repl.). Furthermore, there is no statute condoning an optometrist's professional association with or employment by dispensing opticians. *See id.* § 63-8-113. The reason for this is that opticians are not health care professionals; they are specifically prohibited from examining eyes or diagnosing, treating, or correcting "any

human ailment . . . or physical condition." *Id.* § 63-14-102(2). Consequently, although optometrists permissibly may employ dispensing opticians, to allow optometrists to form business associations with dispensing opticians – or with businesses "in the practice of dispensing opticians," such as LensCrafters – would be equivalent to allowing optometrists to form business associations with non-health care provider commercial entities.[8] By allowing such business associations, we would risk subordinating the standards of the optometry profession to the influence of commercial interests operated by lay business persons rather than by health care professionals.

In holding that businesses which sell ophthalmic lenses and frames are retail establishments within the meaning of Tenn. Code Ann. § 63-8-113(c)(6), we must also address whether this interpretation renders the optometry statute internally inconsistent. Although this argument was not raised by the parties, one might assert that optometrists are allowed to sell lenses and frames within their own practice, Tenn. Code Ann. § 63-8-102(12), and yet by doing so, they violate the prohibition against practicing in a "retail store . . . where merchandise is . . . offered for sale."[9] However, we decline to hold that this inconsistency requires that the phrase "retail store or

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[8] We find that the production and sales of ophthalmic lenses and frames does not constitute the delivery of health care.

[9] Another point raised in our discussions concerned the possibility that if an optometrist has prescriptions filled by an independently owned dispensing optician, then the optometrist would be working "in conjunction with" a commercial establishment in violation of the statute. However, because "in conjunction with" is defined to mean being joined together in an association, *see* Black's Law Dictionary 765 (6th ed. 1990), such business practices would not violate the statute.

other commercial establishment" be interpreted to exclude stores engaged primarily in the business of selling and dispensing ophthalmic lenses and frames. A more reasonable interpretation is that the phrase "retail and commercial establishments" refers to "non-health care profession" commercial entities. We reach this conclusion in large part by reference to Tenn. Code Ann. § 63-8-113(c)(2), which implicitly allows an optometrist to be employed by persons and entities "engaged primarily in health care delivery." This construction of the statute prevents the "lay control of optometrists,"[10] advances the goal of encouraging a direct line of responsibility from licensed optometrists to their patients, and further allows optometrists to practice in professional associations with other licensed health care professionals who are not only in the practice of health care delivery, but who also sell ophthalmic products.

III. Conclusion

Accordingly, we answer the question certified to us by the United States District Court for the Middle District of Tennessee as follows:

> An entity engaged primarily in the business of selling and dispensing ophthalmic lenses and frames is a "retail store or other commercial establishment" within the meaning of Tenn. Code Ann. § 63-8-113(c)(6).

The clerk will transmit this opinion in accordance with Rule 23, Section 8 of the Rules of the Supreme Court.

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[10] *See California Ass'n of Disp. Opticians v. Pearle Vision*, 143 Cal. App. 3d 419, 191 Cal. Rptr. 762, 769 (Cal. Ct. App. 1983).

The costs in this Court are taxed equally between the parties.

ADOLPHO A. BIRCH, JR., JUSTICE

APPENDIX E

No. 03-5512

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LENSCRAFTERS, INC., ET AL., Plaintiff-Appellants,	)	
v.	)	
KENNETH S. ROBINSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TENNESSEE DEPARTMENT OF HEALTH, ET AL.,	)	ORDER (Filed Jul. 29, 2005)
Defendants-Appellees.	)	

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and JORDAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

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* Hon. R. Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designation.

** Judge Sutton recused himself from participation in this ruling.

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk /lm/

(3)

FILED
DEC 30 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-702

In The Supreme Court of the United States

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Petitioners,

v.

KENNETH S. ROBINSON, in his official capacity as Commissioner of the Tennessee Department of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth Circuit properly found that Tennessee Code Annotated §63-8-113(c)(6) does not violate the Commerce Clause.

1. Whether the statute, on its face, in its purpose, or in its effect, discriminates against interstate commerce.

2. Whether the statute imposes a burden on interstate commerce which clearly exceeds the putative local benefit.

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STATUTES

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STATEMENT OF THE CASE

1. Introduction

The plaintiffs claim that Tenn. Code Ann. §63-8-113(c)(6) violates the Commerce Clause. Section 63-8-113(c)(6), which has been in effect since April 17, 1967, provides that it is unlawful for any licensed optometrist to "practice or offer to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." In Tennessee, prior to 1967, many optometrists practiced in locally owned and operated jewelry stores and dispensed eyeglasses from such locations. C.A.J.A.[1] 725. Section 63-8-113(c)(6) sought to remove the practice of optometry, a medical discipline, from department stores and jewelry stores. *Id.* The purpose of the proposed legislation was to elevate the practice of optometry to a professional level and to protect the public from any harm which may result from the subjection of the profession of optometry to purely commercial interests. *Id.*

This Court, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), rejected a constitutional challenge to a remarkably similar optometric statute in Oklahoma. This Court noted that such a statute is "an attempt to free the [optometric] profession, to as great an extent as possible, from all taints of commercialism." *Williamson*, 348 U.S. at 491. In this very case, the Supreme Court of Tennessee recognized that Section 63-8-113(c)(6) was part of a legislative effort to police the practice of optometry in Tennessee. The Court held that "allowing optometrists to practice in conjunction with businesses . . . may involve a

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[1] References to the Joint Appendix filed in the Court of Appeals are abbreviated "C.A.J.A."

compromise of the optometrists' professional autonomy." *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 778 (Tenn. 2000). The court further noted that "By allowing such business associations, we would risk subordinating the standards of the optometry profession to the influence of commercial interests. . . ." *Id.*

The record developed below fully demonstrated the need for such a statute in Tennessee. Retail stores frequently attempt to control the practice of optometrists who practice in, or in conjunction with, their stores. The record, for example, contains evidence that plaintiff LensCrafters dictates where and when an optometrist will practice (C.A.J.A. 649); encourages optometrists to prescribe new lenses to a patient even if such are not warranted (*Id.* at 648); pressures optometrists to see more patients per hour (*Massengale v. Oklahoma Bd. of Exam'rs in Optometry*, 29 P.3d 558, 567, n.35 (Okla. 2001)); encourages optometrists to recommend expensive, premium lenses to their patients (C.A.J.A. 648); encourages optometrists to recommend to patients that they purchase their eyeglasses at LensCrafters (*Id.*); and even inserts itself into the practice of optometry by scheduling patients for appointments and then calling patients for follow-up visits (*Id.*).

The record demonstrates that other retailers likewise interfere with the doctor-patient relationship in numerous respects. Wal-Mart, for example, has as a stated objective the "assimilation" of all of its optometrists into the "Wal-Mart culture." (C.A.J.A. 639). Wal-Mart receives 20% of its affiliated optometrists' gross professional fees in exchange for the lease of the examination office, equipment, and the use of Wal-Mart's staff in the operation of the practice. *Id.* at 637. Wal-Mart precludes its optometrists from selling eyeglasses or contact lenses (*Id.*); dictates the number of days and hours that its optometrists must

work (*Id.*); hires, fires and retains all of the staff that work in the optometrist's office (*Id.* at 638); schedules all of the optometrist's appointments and has unfettered access to confidential patient medical records and the optometrist's appointment book (*Id.* at 638); dictates the number of patients that its optometrists see per hour (*Id.*); and pressures its optometrists to "sell from the chair," or encourage patients to purchase "extras," such as lens tinting and ultraviolet coating from the Wal-Mart dispensary. *Id.* at 639.

Tenn. Code Ann. §63-8-113(c)(6) is designed to curb such encroachments upon the independent practice of optometry in Tennessee.

2. Misstatements of Fact and Law

The petitioners, for their part, attempt to cast Section 63-8-113(c)(6) as a protectionist measure which discriminates against interstate commerce. Petitioners do so despite the fact that Section 63-8-113(c)(6) applies to all retail establishments in Tennessee, whether owned by in-state or out-of-state interests. Petitioners' Statement of the Case contains the following statements which require clarification:

a. Petitioners claim that "Tennessee . . . is one of the minority of states that also affords in-state businesses owned by such prescribers a significant competitive advantage in the sale of prescription eyewear." Petition, p.2. This statement does not accurately state the effect of Tenn. Code Ann. §63-8-113(c)(6). Section 63-8-113(c)(6) applies to a retail store owned by a Tennessee optometrist (or anyone else) to the same extent that it applies to the plaintiffs' stores. The Supreme Court of Tennessee addressed this precise issue in this case. The court ruled that

Section 63-8-113(c)(6) does not prohibit an optometrist's sale of frames and lenses incident to an optometric practice because the optometrist is "engaged primarily in health care delivery." *LensCrafters*, 33 S.W.3d at 778. The court reached this conclusion by reference to Tenn. Code Ann. §63-8-113(c)(2) which allows optometrists to be employed by persons or entities "engaged primarily in health care delivery." *Id.* Thus, an optometrist may sell frames and lenses incident to the delivery of health care, i.e., incident to an optometric practice, but an optometrist may not simply own a retail store and then practice inside of it. Otherwise stated, an optometrist who is not "engaged primarily in health care delivery" but who is, rather, engaged primarily in retail sales, is subject to Section 63-8-113(c)(6) to the same extent as any other in-state or out-of-state actor. An optometrist, for example, who owns a department store may not practice inside the store. Likewise, if LensCrafters, Inc. were sold to a Tennessee-licensed optometrist, LensCrafters would not thereby be transformed into a health care provider which could suddenly place optometrists inside its stores and control the practice of optometry.

b. Petitioners claim that "Tennessee provides an exclusive advantage to these in-state retailers at the expense of all of their out-of-state competitors who could not sell eyewear at the same location where eye examinations and prescriptions are available." Petition, pp.2, 3. This statement is misleading in two respects. First, optometrists are licensed health care professionals. *LensCrafters*, 33 S.W.3d at 778. Optometrists are not "in-state retailers." If an optometrist owns a business engaged primarily in the retail sale of ophthalmic materials, the optometrist may not practice "in, or in conjunction with" such a commercial establishment. *LensCrafters*, 33 S.W.3d

at 778. Second, the statute plainly applies to both in-state and out-of-state retail establishments. See Petition, p.12a. Section 63-8-113(c)(6) does not allow an optometrist licensed in Tennessee to practice "in, or in conjunction with" any retail store, whether owned by in-state or out-of-state interests.

c. According to petitioners, "Respondents do not contest that the state law prohibition against others offering one-stop shopping for prescription eyewear places out-of-state retailers at a significant competitive disadvantage." Petition, p.4. Respondents very much contest petitioners' assertion. Petitioners' mantra of "one-stop shopping" is misleading. A patient who visits a Tennessee optometrist for an eye examination is not engaged in "shopping." The patient is seeking health care services. Further, Section 63-8-113(c)(6) does not place "out-of-state" retailers at a significant competitive disadvantage. The statute treats out-of-state retail stores and in-state retail stores even-handedly. An optometrist may not practice "in, or in conjunction with" either.

d. Petitioners claim that "The Tennessee Supreme Court held that the statute's prohibition applies to all retail prescription eyewear businesses, other than those owned by state licensed professionals." Petition, p.6. The Supreme Court of Tennessee did not so hold. Rather, as set forth supra, that Court very clearly held that Section 63-8-113(c)(6) does not prohibit an optometrist from offering patients eyeglasses as an incident of an optometric practice. If an optometrist ceases to be engaged primarily in health care delivery, then the optometrist is subject to the strictures of Section 63-8-113(c)(6). *LensCrafters*, 33 S.W.3d at 778.

e. Petitioners assert that "All Board members are in-state optometrists operating retail prescription eyewear businesses in competition with Petitioners." Petition, p.7. This is not true. There is nothing in the record to establish that the members of the Board are engaged primarily in the retail sale of eyewear, and not in the practice of optometry. Even if this were true, it would only establish that certain Board members may be in violation of Section 63-8-113(c)(6), not that the statute is unconstitutional.

REASONS FOR DENYING THE WRIT

1. The decision below was not contrary to *Tracy* and does not broaden a split among the Circuits.

a. *Tracy* Did Not Hold That Entities Which Compete Are Necessarily Similarly Situated for Purposes of the Commerce Clause.

Petitioners' claim that this Court should review this case because the Sixth Circuit "failed to apply the *Tracy* test" in deciding that out-of-state retail stores and in-state doctors of optometry are not similarly situated. Petition, p.13. Petitioners further claim that review is appropriate because the Sixth Circuit's decision "broadens" a split in the circuits regarding the so-called "*Tracy* test." *Id.*

There is, however, no "*Tracy* test," much less one that the Sixth Circuit failed to apply or which is currently the cause of a split among the federal circuits.

Petitioners posit that, in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), this Court adopted a test to determine whether an out-of-state entity and an in-state

entity are "similarly situated." According to petitioners, *Tracy* holds that, for purposes of the Commerce Clause, an out-of-state entity and an in-state entity are "similarly situated", if they compete in the same market. Petition, p.13. Specifically, petitioners assert that *Tracy* held that the "similarly situated inquiry" is resolved by simply asking whether there is "actual or prospective competition" in some market between the out-of-state and in-state entities. *Id.* If such competition exists, petitioners assert, then the entities are similarly situated. If there is no such competition, then the entities are not similarly situated.

Tracy, however, created no such test. In fact, *Tracy* found that there was "actual or prospective" competition between the supposedly favored in-state entity and the supposedly disfavored out-of-state entity, yet found that the entities were not similarly situated for purposes of the Commerce Clause.

Tracy arose out of the State of Ohio's imposition of its general sales and use taxes on the purchase of natural gas. Ohio taxed the purchase of natural gas from all sellers, whether in-state or out-of-state, except purchases from domestic public utilities which met the definition of a "natural gas company." *Tracy*, 519 U.S. at 281-82. The issue in *Tracy* was whether Ohio's differential tax treatment of domestic utilities and out-of-state sellers of natural gas constituted discrimination against interstate commerce in violation of the dormant, or negative, Commerce Clause.

Tracy held that such differential tax treatment did not constitute discrimination in violation of the Commerce Clause. *Tracy*, 519 U.S. at 303-04. *Tracy* first recognized that "any notion of discrimination assumes a comparison

of substantially similar entities." *Id.* at 298. "[W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Id.* at 299. In *Tracy*, the allegedly competing entities provided different products. The in-state entities (regulated, domestic utility companies) provided natural gas bundled with services and protections required by statute. *Id.* at pp.297-98. The out-of-state entities (sellers of natural gas) provided gas which was not "bundled" with any such services or protections. *Id.* The out-of-state sellers did not compete with the public utilities, also known as local distribution companies (or "LDCs"), in the LDC's core market of small, captive users (typically residential users) who needed a "bundled" product. *Id.* at 301. There was, however, "a further market where the sellers of bundled and unbundled products apparently do compete and may compete further." *Id.* at 303. This market was a non-captive market made up primarily of large end-users of natural gas, such as General Motors. *Id.* at 303, 307.

Despite the existence of competition between the in-state utilities and the out-of-state sellers in the non-captive market, this Court held that the respective entities were not "similarly situated" for constitutional purposes. *Id.* at 304. In so doing, this Court attached "greater weight" to the captive market and treated the entities as dissimilar. *Id.* Otherwise stated, despite the fact that the in-state regulated utilities and the out-of-state sellers competed with each other in a given market, *Tracy* nevertheless held that the respective entities were not "similarly situated" for constitutional purposes, and thus found no discrimination.

The foregoing review of *Tracy* fully debunks petitioners' assertions here that *Tracy* established an "actual or prospective competition" test for determining whether in-state and out-of-state actors are similarly situated for constitutional purposes. If *Tracy* had actually established the test which petitioners advocate, the result in *Tracy* would have been precisely the opposite. *Tracy* reveals that "actual or prospective competition" between in-state and out-of-state actors is a necessary but not sufficient condition which must exist in order for such entities to be considered "similarly situated."

b. The Sixth Circuit Properly Applied *Tracy*.

The Sixth Circuit's ruling below is entirely consistent with *Tracy*. The supposedly disfavored entities are the petitioners and other out-of-state retail stores which sell, among other things, prescription eyewear. The supposedly favored entities are Tennessee-licensed doctors of optometry who provide health care services to their patients and who, as part of their practice, are allowed to make prescription eyeglasses and contact lenses available to their patients.

These optometrists are engaged primarily in the practice of health care, i.e., the practice of optometry, a learned medical discipline. *LensCrafters*, 33 S.W.3d at 778. They operate health care practices, not retail stores. Petitioners do not compete with Tennessee-licensed optometrists in the marketing or delivery of health care services. Even to the extent that petitioners claim to compete with such health care professionals in the sale of ophthalmic materials, because optometrists are "primarily" health care providers, under *Tracy*, greater weight

should be given to this health care market in which there is no competition.[2] As a result, the supposedly favored and disfavored entities are not similarly situated for purposes of the Commerce Clause. The Sixth Circuit's decision in this regard does not conflict with, and is in fact supported by, *Tracy*.

c. There Is No Split Among the Circuits With Regard to *Tracy*.

Petitioners also seek review of this case on the basis that the Sixth Circuit's decision below "places it on one side of a broadening divide among the circuits." Petition, p.15. In petitioners' view, the Sixth Circuit has aligned itself with the Fifth Circuit's decisions in *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), and *International Truck & Engine Corp. v. Bray*, 372 F.3d 717 (5th Cir. 2004), and the Second Circuit's decision in *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003), in holding that in-state and out-of-state actors may not be "similarly situated" even where competition may exist between them in some market. Petition, p.18. Petitioners further claim that on

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[2] Petitioners claim that Tennessee optometrists wear two hats: one as a health care provider and another as a market participant in the retail sale of eyewear. Petition, p.13. It would be more accurate, however, to say that Tennessee optometrists wear but one hat, and it is a different hat from that worn by petitioners. Tennessee-licensed optometrists are health care providers who may offer prescription eyewear to their patients. If an optometrist ceases to be "engaged primarily in health care delivery" (*LensCrafters*, 33 S.W.3d at 778), and instead becomes, like LensCrafters, "engaged primarily in the business of selling and dispensing ophthalmic lenses and frames" (*Id.*), then the optometrist becomes just another in-state or out-of-state retailer and must comply with Section 63-8-113(c)(6).

the other side of this "divide" exists the First Circuit's decision in *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986), the Seventh Circuit's decision in *Government Suppliers' Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1933), and the Eighth Circuit's decision in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), all of whom allegedly embrace the "*Tracy* test" for determining whether supposedly favored and disfavored entities are "similarly situated." There is, however, no so such divide.

Respondents agree that the Sixth Circuit's decision here is wholly consistent with the decisions of the Fifth Circuit and Second Circuit, all of which were decided after *Tracy*. Respondents disagree, however, that the Sixth Circuit's decision is inconsistent with the cited decisions of the First, Seventh, and Eighth Circuits.

At the outset, it should be noted that the decisions of the First, Seventh and Eighth Circuits upon which petitioners rely all pre-date *Tracy*. Thus, no argument can be made that the federal circuits are in conflict in applying the principles articulated in *Tracy*. An analysis of the three decisions which petitioners cite also reveals that there is also no conflict with regard to the factors to be considered in determining whether in-state and out-of-state entities are similarly situated.

In *National Revenue Corporation v. Violet*, the First Circuit struck down a Rhode Island statute which, in effect, foreclosed any out-of-state debt collectors from seeking to collect debts from Rhode Island citizens. *National Revenue*, 807 F.2d at 289. The court did so on the basis that the law discriminated against out-of-state

interests and the state did not rebut such discrimination by showing a legitimate local purpose which could not be served as well by non-discriminatory means. *Id.* at 290. No party raised, and the court did not address, the question of whether the supposedly favored in-state interests and the supposedly disfavored out-of-state interests were similarly situated. In fact, the words "similarly situated" do not even appear in the court's opinion. Petitioners cannot establish the existence of a split in the circuits by reference to a case which did not consider or address the issue as to which a conflict among the circuits allegedly exists.

The second case upon which petitioners rely to demonstrate the existence of a "divide" between the circuits, *Government Suppliers v. Bayh*, fares no better. In that case, the Seventh Circuit struck down portions of an Indiana statute which regulated the disposal of out-of-state waste in Indiana. With the exception of a passing reference that the district court found that the statute "applied identically to similarly situated waste haulers" (*Government Suppliers*, 975 F.2d at 1273), there is no reference to, discussion of, or decision regarding whether the supposedly favored and disfavored entities were or were not similarly situated anywhere in the Court's 16-page opinion. There certainly is no support for petitioners' conclusory statement that "the court recognized that the different trucking businesses were competitors, and thus similarly situated." Petition, p.17. Nothing in the Seventh Circuit's opinion in *Government Suppliers* is inconsistent with the Sixth Circuit's decision below, with the Fifth

Circuit's decision in *Ford*, or the Second Circuit's decision in *Brown & Williamson*.[3]

The third and final decision upon which petitioners base their claim that there exists a split of authority among the circuits is the Eighth Circuit's decision in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993). Once again, however, the issue of whether the in-state and out-of-state actors were "similarly situated" was not addressed. Rather, the court determined that the effect of the ordinance at issue was to forbid the transport of waste out of the county, and struck down the statute as discriminatory. There is no analysis in the opinion as to whether the supposedly favored or disfavored waste haulers were or were not similarly situated. Nothing in *Waste Systems Corp.* evidences a "divide" in the circuits with regard to any pre- or post-*Tracy* test concerning similarly situated entities.

Accordingly, there is no divide between the circuits which this Court needs to bridge.

2. The decision below did not rob *Pike* of its utility, nor does it add to a split among the Circuits with regard to *Pike*.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), this Court held that "[w]here a statute regulates even-handedly to effectuate a legitimate local public

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[3] In addition, the continued vitality of *Government Suppliers* is called into question by *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), which upheld waste-disposal regulations similar to those at issue in *Government Suppliers*.

interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Below, the Sixth Circuit affirmed the district court's rejection of petitioners' claim that, even if Section 63-8-113(c)(6) regulates evenhandedly, the burdens imposed on interstate commerce clearly exceeded the local benefits of the statute. Petition, p.14a. In so doing, the Sixth Circuit adopted the district court's view that petitioners' claim fails because any burden imposed by the statute was imposed on commerce generally. C.A.J.A. 148. There was no burden imposed solely on interstate commerce. *Id.* This ruling is consistent with the view expressed repeatedly by the Second Circuit that an "excessive burden in relation to putative benefits . . . is a burden on interstate commerce that is different from the burden imposed on intrastate commerce." *Brown & Williamson*, 320 F.3d at 209. "To run afoul of the *Pike* standard, the statute must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfr's Assn. v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001).

Petitioners claim that the Sixth Circuit's application of *Pike* "robs the *Pike* test of its utility" and "adds to a Circuit split regarding which burdens on interstate commerce are relevant to that test." Petition, p.28. Both claims lack merit.

a. There Is No Split Among the Circuits.

Petitioners claim that there exists a split in the federal circuits concerning *Pike* balancing which justifies this Court's review of this case. According to the petitioners, the

circuits are split as to the question of what burdens upon interstate commerce are relevant under *Pike*. Petition, p.28. Petitioners assert that, like the Sixth Circuit below, the Second, Third, Fifth and Seventh Circuits have held that only "burdens that fall more heavily on interstate commerce than in-state commerce are cognizable under *Pike*." *Id.* at p.29. By contrast, petitioners claim the Eighth and Tenth Circuits hold "that all burdens on interstate commerce imposed by the challenged state law are relevant to the *Pike* balancing test." *Id.* at p.28. Further analysis of the issue, however, demonstrates that any alleged split is linguistic, not substantive.

Petitioners claim that the Eighth and Tenth Circuits are split from the other circuits. The Tenth Circuit case upon which petitioners rely is *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). But in a more recent case, the Tenth Circuit expressly embraced the principles articulated by the Second Circuit in applying *Pike*. In *V-1 Oil Company v. Utah State Department of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997), the Tenth Circuit – quoting with approval the Second Circuit's decision in *New York State Travelers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) – held that the "'incidental burdens' of the *Pike* inquiry 'are the burdens on interstate commerce that ***exceed*** the burdens on intrastate commerce." (emphasis added) The Tenth Circuit is not split from the Second Circuit with regard to *Pike* balancing but rather is in accord with the Second Circuit. Likewise, there is no tension between the Tenth Circuit's approach to *Pike* balancing in *V-1 Oil* and the Sixth Circuit's decision below. In fact, in *V-1 Oil*, the Tenth Circuit ultimately concluded, with regard to the licensing fees at issue, that "there is no evidence that the burdens upon interstate commerce are

anything but incidental, and certainly are not 'clearly excessive' under *Pike*." *V-1 Oil*, 131 F.3d at 1427.

The Eighth Circuit decision, *R&M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), upon which petitioners reply to evidence a split, is likewise easily reconciled with the decisions of the other circuits. In *R&M*, the plaintiff challenged a Missouri statute which required bulk sellers of propane gas at retail to maintain and operate a storage facility in Missouri having a capacity of at least 18,000 gallons. *R&M*, 307 F.3d at 733. The Eighth Circuit agreed with the district court that the statute provided "relatively little local benefit," yet imposed an initial investment expense of $35,000 to $60,000 upon sellers. *Id.* at 736. The Court found the burden of this expense to be significant, and relying on *Pike*, found the statute unconstitutional. *Id.*

The Eighth Circuit's application of *Pike* in *R&M* does not show any disharmony with the other circuits. The burden imposed in *R&M* (the $35,000 to $60,000 in initial investment costs) was an additional burden to be borne by interstate propane distributors only. Distributors which operated only in Missouri had already invested in in-state storage facilities and were left unaffected by the statute. Thus, the Eighth Circuit's holding is perfectly consistent with the Second Circuit's position that an excessive burden under *Pike* is one that is "different from" the burden imposed on intrastate commerce. See *Brown & Williamson*, 320 F.3d at 209.

Petitioners assert that a conflict exists on the basis of the *R&M* court's statement that it must look at the "cumulative effects of the Missouri statute on all propane distributors." Petition, p.28. The "cumulative effects" to which

the court referred, however, have nothing to do with the burden imposed upon the plaintiff, R&M. Rather, "cumulative effects" refers to the consideration of the effect of not only the statute itself, but also consideration of "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many, or every, state adopted similar legislation." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000). *R&M* expressly cited to *U&I Sanitation* for this proposition of law. *R&M*, 307 F.3d at 736. In context, the "cumulative effects" language in *R&M* is unrelated to the alleged division among the circuits with respect to *Pike* balancing.

In the final analysis, any disparity which exists in the decisions to which petitioners refer is a disparity in expression, not in meaning. This is so because there is no real difference between the "burden imposed upon interstate commerce" (which petitioners claim is the standard used by the Eighth and Tenth Circuits) and the "additional burden imposed upon interstate commerce" (which petitioners claim is the standard used by the Second, Third, Fifth, Sixth and Seventh Circuits). States are free to regulate or burden commerce which is purely intrastate. See *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419, 2423 (2005). Such regulation is not precluded by the Commerce Clause. The Commerce Clause is implicated only when a state regulation burdens interstate commerce. Whether a court refers to this burden as the "burden on interstate commerce" or the "additional burden on interstate commerce" is immaterial. In substance, the burden being considered is the same.

b. The Sixth Circuit Did Not Rob *Pike* of Its Utility.

Petitioners claim that the Sixth Circuit's application of *Pike* "robs [it] of its utility." Petition, p.30. According to petitioners, " . . . to hold that the only burdens that count under *Pike* are those that result from discriminatory treatment of firms doing business in interstate commerce is to say that *Pike* applies only in cases where a statute has already been struck down as impermissibly discriminatory. . . ." *Id.* The Sixth Circuit did not hold below, that the only burdens that count under *Pike* are those that result from discriminatory treatment of firms doing business in interstate commerce. That Court recognized that *Pike* applies where a statute regulates even-handedly, i.e., where there is no discriminatory treatment.[4] Petition, p.13a. If the Court below had found discriminatory treatment, it would likely never have reached the *Pike* analysis. Petitioners' criticism of the Sixth Circuit's opinion in this regard is clearly unfounded.

Further, the Sixth Circuit's recognition below that the incidental burden relevant under *Pike* is the burden placed upon interstate commerce which is different from and in addition to that placed on commerce generally in no way undermines *Pike*. A non-discriminatory statute which regulates even-handedly may nevertheless impose an incidental burden upon interstate commerce. The mere

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[4] *Pike* also has utility in a case, like the instant case, where a petitioner alleges that disparate treatment constitutes discrimination, but the objects of the disparate treatment are not similarly situated. A state regulation which treats dissimilar in-state and out-of-state actors disparately must nonetheless pass muster under *Pike*. Petitioners cannot claim that the Sixth Circuit's ruling below robbed *Pike* of utility in this respect.

fact that a statute places an incidental burden upon interstate commerce does not render the statute discriminatory.

In *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 473 (1981), for example, his Court wrote that "Even granting that the out-of-state plastics industry is burdened relatively more heavily then the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest." In petitioners' view of things, such a result should not be possible because a heavier burden on interstate commerce equals discrimination. This Court also rejected this view in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978), where it noted that "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Likewise, in *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 429 (1963), this Court held that a statute which simply burdens commerce in some respect does not necessarily have a discriminatory effect. This Court has, thus, repeatedly recognized that even a non-discriminatory statute may burden interstate commerce more heavily than intrastate commerce. Petitioner's position that a statute which burdens interstate commerce more heavily than intrastate commerce is necessarily discriminatory has already been firmly rejected by the Court.

The petitioners also fail to appreciate that the line which divides a statute which impermissibly discriminates in effect against interstate commerce from one which regulates even-handedly but imposes an incidental burden upon interstate commerce is not always clear. In *Brown-Forman Distillers Corporation v. New York State Liquor*

Authority, 476 U.S. 573, 579 (1986), this Court recognized that "there is no clear line separating the category of state regulations that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." See also *Tracy*, 519 U.S. at 299. In contrast to *Brown-Forman*, the petitioners offer a bright-line rule which provides that any statute imposing a burden upon interstate commerce which exceeds that placed upon intrastate commerce is subject to a per se rule of invalidity and is not properly suited to *Pike* balancing. This Court's jurisprudence has already rejected such a bright-line rule. There is no need to do so again here.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 05-702

In The
Supreme Court of the United States

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Petitioners,

v.

KENNETH S. ROBINSON, in his official capacity as the Commissioner of the Tennessee Department Of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. Respondents' Own Arguments Confirm That The Lower Courts Are In Conflict On *Tracy* And That This Court's Review Is Needed

Respondents attempt to defeat the need for this Court's review by claiming that there is no split among the lower courts on the meaning of the "similarly situated" holding in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and that the court below correctly applied *Tracy*. Both claims are proven wrong by respondents' own arguments.

1. Respondents err in contending that, notwithstanding *Tracy*, entities that are in "actual or prospective competition" with each other are not necessarily "similarly situated" for purposes of Commerce Clause analysis. And they are wrong that the Sixth Circuit ruling below to that effect is not in conflict with lower courts on the issue.[1]

First, respondents completely ignore the direct conflict between the Sixth Circuit and the rulings of the appellate courts of two States. As demonstrated in the petition (Pet. 17-18 n.5), the Supreme Court of New Hampshire and the Court of Appeal of California have squarely faced situations that required a determination whether entities were "similarly situated" under the Commerce Clause, and in both instances those courts determined that the "actual or prospective competition" test was sufficient (as petitioners maintain), not just necessary (as respondents now claim, Br. in Opp. 9), to meet the requirement of *Tracy*. *See Smith v. New Hampshire Dep't of Rev. Admin.*, 813 A.2d 372, 378 (N.H. 2002) (*Tracy* requires proof that "products from out-of-state non-banks were similarly situated to products from New Hampshire banks, in that

[1] Respondents introduce their argument by reliance on *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), but that opinion addressed Due Process and Equal Protection arguments under a rational relationship standard and provided no view whatsoever on any Commerce Clause issue.

they competed against one another in the same market"), *cert. denied*, 538 U.S. 1025 (2003); *Jordan v. California Department of Motor Vehicles*, 75 Cal. App. 4th 449, 462 (1999) ("For used California-certified vehicles and used federally certified vehicles to constitute different products that are not similarly situated for commerce clause purposes, they must have different markets and not compete with each other.").

Second, respondents attempt to discount the opinions of the First, Seventh, and Eighth Circuits that conflict with the Sixth Circuit because those opinions pre-date *Tracy* and do not use the "similarly situated" terminology in their analyses. *See* Br. in Opp. 11-13. But *Tracy* made clear that its "similarly situated" analysis merely stated explicitly what had been implicit even in earlier case law, even if it had not used the same terminology. *Tracy*, 519 U.S. at 298 ("any notion of discrimination assumes a comparison of substantially similar entities" but this "central assumption" had "more often than not itself remained dormant in this Court's opinions") (footnote omitted).

Therefore, it is of no consequence that those circuit decisions pre-date *Tracy* and are not couched in the same terms as *Tracy*. Those cases found discrimination that violated the Commerce Clause. Such a finding, as *Tracy* makes clear, necessarily "assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. *See National Revenue Corp. v. Violet*, 807 F.2d 285, 289-290 (1st Cir. 1986) (finding discrimination in violation of the Commerce Clause); *Government Suppliers' Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1276-1277 (7th Cir. 1992) (same), *cert. denied*, 506 U.S. 1053 (1993); and *Waste Systems Corp. v. County of Marin*, 985 F.2d 1381, 1386-1388 (8th Cir. 1993) (same). The finding of discrimination in each case rested on differential treatment of entities engaged in actual or prospective competition. Unlike the Sixth Circuit here, those cases did not allow any superficial distinctions between the competing businesses to undermine that discrimination finding. If the instant case had been litigated in any of those circuits, discrimination would have

been found based on the differential treatment of the entities because they are direct competitors.

The Sixth Circuit decision conflicts most starkly with that of the First Circuit in *National Revenue*. In *National Revenue*, the First Circuit found that a Rhode Island law that defined debt collection as the practice of law discriminated against out-of-state commercial debt collection companies. Unlike the Sixth Circuit here, the First Circuit did not find that the entities were not similarly situated merely because of superficial differences between them, including that attorneys have professional duties to clients that debt collection agencies do not. Rather, because the entities potentially competed in the same market for the same customers, the differential treatment of the similarly situated entities constituted discrimination and the First Circuit put the State to its proof to establish a justification for the evident discrimination. The court ultimately found that justification lacking.[2]

If the First Circuit had decided the instant case, it would have treated the in-state optometrists who sell eyewear at retail as similarly situated to the out-of-state retail eyewear businesses who compete against them, and who prospectively would compete more if the challenged state law were removed. Having so found, the discrimination against interstate commerce would be evident, and the State would have been required to justify it.

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[2] There is nothing to indicate that the First Circuit's decision would be different after *Tracy*. In its recent decision in *Walgreen Co. v. Rullan*, 405 F.3d 50, 59 (1st Cir. 2005), *cert. denied*, No. 05-585 (Jan. 9, 2006), the First Circuit followed *National Revenue* and declared a Puerto Rican law invalid under the Commerce Clause because it "favors the largely local group of established pharmacies over similarly-situated out-of-Commonwealth pharmacies seeking to open new stores." The court held that the contention that the law "treats all newcomers equally" was insufficient to eliminate the discrimination because any distinction between newcomers and established pharmacies with which they sought to compete was irrelevant to the Commerce Clause analysis. *Id.* at 58.

2. In their effort to avoid further review in this case, respondents premise their arguments on a misreading of *Tracy*.

Tracy involved a challenge to a state tax law that gave favorable tax treatment to local gas companies, as opposed to certain out-of-state gas companies. The in-state companies distributed natural gas pursuant to state regulations that they "bundle" that service with guarantees that, *inter alia*, they would serve all members of the public, charge only a regulated just and reasonable rate and, for residential customers, provide a backup supply and a degree of continued service to low-income non-paying customers. The Court ruled that the out-of-state natural gas marketers that sold gas free of those state regulatory requirements to larger, nonresidential customers were not similarly situated because, even if the challenged tax preference were removed, those marketers still would not and could not compete in the local distributors' "core market of small, captive users typified by residential consumers who want and need the bundled product." *Tracy*, 519 U.S. at 301.

Respondents focus on the fact that the *Tracy* Court ruled that a possibility of competition in a different, noncaptive gas market (where the record "reveal[ed] virtually nothing about the details of that competitive market," *id.* at 302) did not alter the initial finding that the gas sellers were not similarly situated. In doing so, however, respondents disregard the fact that this part of *Tracy*'s holding still was related to the scope of *competition* between the entities, *see id.* at 310, and not to the sort of superficial distinction between the competing businesses on which the Sixth Circuit relied.

Respondents also ignore the fact that *Tracy* relied heavily on Congress's exercise of its constitutional authority, through the National Gas Act, to "altogether exempt[] state regulation of retail sales of natural gas (including in-state sales to large industrial customers) from the strictures of the dormant Commerce Clause." *Id.* at 304. The Court analyzed, in detail, the 50 years of unbroken recognition by Congress of state authority over

intrastate natural gas and ruled that it was for Congress, not the Court, "to strike the balance between the needs of the competitive and captive markets" in the natural gas industry in light of the past congressional action. *Ibid.* The instant case does not present any comparable scenario of a vital, congressionally sanctioned noncompetitive market. To the contrary, the Federal Trade Commission has found that statutes such as the one challenged here are harmful to consumers and are not justified by any alleged state interest. *See* Pet. 22-23; Brief of National Optometric Association Supp. Pet. 8-11 (emphasizing FTC's findings of harm to consumers as well as the value to minority optometrists of being able to break into the profession through leasing arrangements with out-of-state retail eyewear businesses).[3]

Respondents never articulate plainly what *Tracy* requires in their view. Their vague interpretation gives courts free rein to conflate the justification and nondiscriminatory alternative prongs of the Commerce Clause test with the discrimination prong, thereby failing to require States to meet the constitutional standard for differential treatment of in-state and out-of-state entities. *See* Pet. 20-23 (discussing circuit split on issue).

3. Respondents also premise their arguments on a misreading of the state statute that is directly contrary to the definitive interpretation of the statute by the Tennessee Supreme Court that was ruled on by the Sixth Circuit.

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[3] There is no plausible threat to any health care market if petitioners prevail on the merits of their challenge in the instant case. One of the nondiscriminatory alternatives readily available to the state legislature that petitioners discussed below would be to make it unlawful for any entity to sell eyewear at the same location where eye examinations are provided. This would be fully consistent with Tennessee law, which does not require optometrists to sell eyewear, let alone to do so where they provide eye examinations. To the contrary, the Tennessee Supreme Court unequivocally held that the sale of eyewear is *not* the provision of healthcare. Pet. App. 101a n.8.

In an attempt to manufacture equality of treatment between in-state and out-of-state competitors, respondents claim (Br. in Opp. 3-5, 9-10 & n.2) that some in-state optometrists who sell eyewear at the same location where they provide eye examinations are subject to the statute's restriction. Respondents erroneously state that the statutory restriction applies to optometrists who sell enough eyewear that they are engaged "primarily" in the business of selling lenses and frames, rather than "primarily" in the delivery of health care.[4] Of course, they provide no explanation of how their novel line-drawing could realistically be applied, especially where the comparative volume of retail sales and health care services by a particular optometrist fluctuates regularly. In any event, their new interpretation (which has never been enforced by respondents) cannot be squared with the true scope of the state law.

The statute at issue in this case makes it unlawful for a Tennessee optometrist to "[p]ractice * * * optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." Tenn. Code Ann. § 63-8-113(c)(6). The Tennessee Supreme Court's interpretation of the statute, on certified question in this case, reads the prohibition to apply only to "non-health care profession" commercial entities. Pet. App. 102a. The court made clear that the prohibition does not apply to practicing in conjunction with other health care professionals (regardless of whether an optometrist "primarily" sells eyewear or delivers health care). The statute "allows optometrists to practice in professional associations with other licensed health care professionals who are not only in the practice of health care delivery but who also sell ophthalmic products." *Ibid.*

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[4] Respondents borrow language from a different statutory provision, which addresses optometrists working as employees of nonprofessionals. Petitioners do not seek to hire optometrists as employees and do not challenge the distinct state law provision that prohibits employment of optometrists by entities "not engaged primarily in health care delivery." Tenn. Code Ann. § 63-8-113(c)(2).

Moreover, the state statute would still discriminate in violation of the Commerce Clause even if optometrists who "primarily" sell eyewear could not provide eye examinations at the same location where the eyewear is sold. That is because the many optometrists who are "primarily" engaged in the delivery of health could still do so under the protection of the state statute. *See* Pet. App. 35a (the percentage of optometrists' income that comes from retail sales of eyewear ranges from 40 to 60%). The precise level of competition is unrelated to the finding of whether the entities are similarly situated. *See Bacchus Imports v. Dias*, 468 U.S. 263, 269 n.10 (1984) (in order for products not to be similarly situated, there would have to be a finding of "no competition whatsoever"); Pet. 14-15.

4. Respondents do not dispute the conflict demonstrated in the petition (Pet. 24-26) between the Sixth Circuit decision below and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and *Granholm v. Heald*, 125 S. Ct. 1885 (2005). Respondents do not defend the Sixth Circuit's reliance on hypothetical out-of-state optometrists in light of those cases. In addition, although respondents suggest (Br. in Opp. 1) that there were some in-state jewelry and department stores where optometrists had practiced prior to 1967, which are subject to the restriction, they ignore the grandfather clause that was included in the initial enactment of the legislation to protect the jobs of those in-state optometrists (*see* Tenn. Code Ann. § 63-8-113(c)(6)). They also do not counter the fact that, under *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994), and the precedent of other circuits, a law is "no less discriminatory because in-state" businesses "are also covered by the prohibition." *See* Pet. 26-27 & n.10.

The need remains for this Court to resolve the conflict surrounding the application of the "similarly situated" test and discrimination analysis under the Commerce Clause in the lower courts. The misapplication of that analysis by the lower courts has created uncertainty and has resulted in the protection of in-state traditional retail businesses

from innovative out-of-state competition, which raises concerns that go to the heart of the Commerce Clause.

B. Respondents' Misstatements Of The Record Reinforce The Need For Review

Respondents' claim that the record in this case demonstrates a need for the challenged state statute is irrelevant and inaccurate. It is irrelevant because the courts below never reached the issue whether the State could justify the discriminatory statute or whether it was adequately tailored. They pretermitted that inquiry by the erroneous summary judgment ruling that out-of-state retail eyewear businesses are not similarly situated to in-state optometrist-owned retail eyewear businesses.

More to the point, their claim is inaccurate because the record does not demonstrate that the out-of-state retail eyewear businesses engage in sales conduct that is different from in-state optometrist-owned retail eyewear businesses. Petitioners filed affidavits challenging each and every so-called impropriety relied upon by respondents. Furthermore, the affidavits and the evidence that were before the court established, for example, that Tennessee optometrists who sell eyewear can, and do, hire lay persons to manage the retail eyewear sales part of their operations, provide bonuses to their employees for selling more expensive eyewear and increasing their profits, and rely on a variety of subtle and not-so-subtle sales techniques to convince patients to buy high-priced eyewear from that optometrist's retail inventory. Pet. App. 36a. Thus, to the extent state regulation of such conduct is warranted, there is no basis for discriminatory regulation, particularly because the State has never even argued nondiscriminatory means to achieve its interests are unavailable.

C. Respondents' Efforts To Diminish The Split Regarding *Pike* Are Ineffective

Contrary to respondents' assertion (Br. in Opp. 14-20), the different approaches taken by the circuits to determine

the relevant burdens to balance against a State's putative interests under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), can, and in this case did, alter the outcome under that test. Respondents concede (Br. in Opp. 18) that the ruling below, joining the Second, Third, Fifth, and Seventh Circuits, disregards any burden that compliance with the Tennessee law imposes on interstate commerce that is not "different from and in addition to that placed on commerce generally." Only by disregarding those burdens because some in-state businesses also bear them, was the court able to rule on summary judgment that the law's burdens were not excessive in relation to the putative local benefits. Pet. App. 72a, 83a. The petition demonstrated that the Eighth and Tenth Circuits follow a different rule. Pet. 28-29.

The academic literature recognizes the conflict between this approach and that of other circuits: "a review of circuit court opinions" applying *Pike* reveals "a split among the circuits" concerning whether only burdens "result[ing] in disparate treatment between in-state and out-of-state interests" should be considered; "the lower courts have had considerable difficulty in ascertaining" what burdens are relevant. Peter C. Felmly, *Beyond the Reach of States*, 55 Maine L. Rev. 467, 483 & n.130 (2003).

Respondents are wrong that the Eighth and Tenth Circuits would reach the same result as the court below. *See* Br. in Opp. 14-17. The Tenth Circuit expressly rejected the proposition that only the disparate burdens on interstate commerce were relevant to *Pike* balancing. *See Dorrance v. McCarthy*, 957 F.2d 761, 764 (10th Cir. 1992); Pet. 29. Respondents' reliance on *V-1 Oil Co. v. Utah State Department of Public Safety*, 131 F.3d 1415 (10th Cir. 1997), to suggest that the Tenth Circuit has changed its approach is disingenuous. The court there ultimately found that the burden "on both interstate and intrastate commerce" was "relatively minor" and was outweighed by the important state interest in the proper handling of hazardous materials. *Id.* at 1425-1426, 1427. Furthermore, the Tenth Circuit made clear in its even more recent decision in *American Target Advertising, Inc. v. Giani*, 199

F.3d 1241 (10th Cir.), *cert. denied*, 531 U.S. 811 (2000), that the burdens relevant to the *Pike* analysis are those that fall on interstate commerce, even if the same burden falls on in-state firms. *Id.* at 1254 (because the law applied to all pertinent entities who operate in the State, it "certainly burden[ed] interstate commerce for out-of-state firms").

Similarly, in *R&M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), the Eighth Circuit held that, under *Pike*, it needed to look at the "cumulative effects of the Missouri statute on all propane distributors," not just the effects on out-of-state propane distributors. *Id.* at 736. Contrary to respondents' suggestion (Br. in Opp. 17), that holding is not equivalent to the rule that a court must look to the cumulative effect of statutes that might be enacted by other States, which is a point addressed separately in that opinion. *See ibid.* ("In addition to the cumulative effects of the Missouri statute, we must also consider" other States' possible statutes). What is critical is that the Eighth Circuit relied on all the burdens on interstate commerce in its balancing, not just any burden on interstate commerce that exceeded that on intrastate commerce. *Id.* at 736-737.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Petitioners,

v.

KENNETH S. ROBINSON, in his official capacity as the Commissioner of the Tennessee Department of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL OPTOMETRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL OPTOMETRIC ASSOCIATION AS AMICUS CURIAE

This brief is submitted on behalf of the National Optometric Association as amicus curiae.[1]

INTEREST OF AMICUS CURIAE

The National Optometric Association ("NOA"), founded in 1969, is comprised primarily of minority optometrists from across the United States. The purposes of the NOA are (1) to recruit students of color for attendance at schools and colleges of optometry and to place them into appropriate practice settings upon graduation; and (2) to enhance the delivery, effectiveness, and efficiency of eye and vision care services in underserved urban and rural communities, particularly communities of color. The NOA, which counts many optometrists leasing space from corporate optical retailers among its members, has an interest in maintaining the viability of this type of practice because it advances the NOA's goals in important ways.

REASONS FOR GRANTING THE PETITION

Section 63-8-113(c) of the Tennessee Code bars optometrists in Tennessee from leasing space in corporate retail optical establishments, also known as the "corporate practice" of optometry. Tenn. Code § 63-8-113(c)(6) (prohibiting licensed optometrists from "[p]ractic[ing] or offer[ing] to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale"). *See generally* Donald R. Smith, *Checking Your Options in Corporate Optometry*, Optometric Management, Sept. 2001, *available at*

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than amicus, its members, or its counsel contributed monetarily to the brief.

http://www.optometric.com/archive_results.asp?loc=articles/2001/september/newod/nod0901006.htm (describing the business models available in corporate optometry). As petitioners have explained, Tennessee's restriction on corporate optometry impermissibly discriminates against interstate commerce and therefore violates the Commerce Clause of the U.S. Constitution, contrary to the decision below. Because the decision below is wrong and exacerbates a circuit split, review should be granted, as petitioners demonstrate.

But there is still more to this case than that. Tennessee's restriction on the practice of optometry in retail settings is not just an everyday commercial regulation – it is a uniquely pernicious restriction, with severely disproportionate adverse impacts both on the vital health needs of communities of color and on the minority optometrists who are ready and willing to serve them. Despite the recognized importance of early detection and prevention of eye disease, minority communities are already plagued by a lack of accessible, affordable eye care, and Tennessee Code § 63-8-113(c) places needed care much further out of reach. The statute also eliminates an important gateway into the profession for newly licensed minority optometrists – those shown by experience to be most likely to serve minority communities – further depriving these underserved communities of sources of necessary care.

Accordingly, the NOA urges the Court to grant the petition and reverse the decision below.

I. THE PRACTICE OF OPTOMETRY IN CORPORATE RETAIL SETTINGS IS VITAL TO THE DELIVERY OF EYE AND VISION CARE TO COMMUNITIES OF COLOR

Visual impairment disproportionately affects poor and minority individuals who cannot afford the cost of proper eye and vision care. In communities without low-cost care, many people – including those with serious vision problems

– are forced to delay services, or simply to go without them entirely. Because the integration and efficiency of retail optical businesses reduce the cost of optometric care, such chains improve minority access to optometric services.

A. The Problem Of Visual Impairment In The United States

Visual impairment is one of the most frequent causes of disability in the United States. An estimated 80 million Americans have potentially blinding eye diseases, more than one million Americans are currently blind, and an additional 3 million Americans are visually impaired. *See* U.S. Dep't of Health & Human Servs., 2 *Healthy People 2010: Vision and Hearing Report* ch. 28 (2d ed. 2000), *available at* http://www.healthypeople.gov/document/html/volume2/28vision.htm (hereinafter "Vision and Hearing Report"). Twenty-five percent of the United States population suffers from myopia, a vision condition in which near objects are seen clearly, but distant objects do not come into proper focus. *See id.* In 1995, the economic costs from visual impairment were estimated to be more than $38.4 billion. *See id.*

Visual impairments affect all aspects of life. Beyond the obvious impact on quality of life, visual impairments in adults affect the ability to work, read, and maintain personal independence. The impact on children is especially grave because vision problems disrupt the processing of information, interfering with the learning process. In children, visual impairment is associated with "developmental delays and the need for special educational, vocational, and social services, often into adulthood." *Id.*

Despite the gravity of the consequences of visual problems in the United States, a large segment of the population does not utilize or have access to optometric services. The American Optometric Association ("AOA") recommends that adults up to age 40 be examined every two to three

years; that asymptomatic, risk-free adults from age 41 to 60 be examined every two years; and that adults over age 60 be examined annually. *See* AOA, *Recommendations for Regular Optometric Care*, http://www.aoa.org/x1930.xml. At-risk adults should visit the eye doctor every one to two years, or as recommended by a doctor. *Id.* The AOA also recommends that children have their first eye exam by 6 months of age, that they have another exam at age three, another exam before first grade, and exams every two years thereafter. AOA, *Recommendations for Regular Optometric Care*, *supra*. In 2002, however, only 14 percent of children under the age of six had been to a doctor for an eye exam, only one-third of children had undergone vision screening before entering school, and only half of all children had an eye exam before completing high school. *See* Jeffrey Eisenberg, *AOA Congress Report: Improve Patients' Overall Health*, Review of Optometry Online, August 15, 2002, *available at* http://www.revoptom.com/index.asp?page=2_639.htm; Children's Vision Improvement and Learning Readiness Act of 2003, H.R. 2173, 108th Cong. (2003).

This failure to obtain routine optometric care is especially devastating because many of the leading causes of visual impairment are preventable if caught in their early stages. For instance, early diagnosis and treatment of diabetic retinopathy, the leading cause of blindness among people with diabetes, has been shown to prevent vision loss in more than 90 percent of patients. *See Vision and Hearing Report.* But because people with diabetes often do not visit optometrists for the recommended annual dilated eye examinations, an estimated fifty percent of patients are diagnosed too late for the treatment to be effective. *See id.* Treatment is also available to slow the progression of glaucoma, which affects an estimated three million people. *See id.* Unfortunately, more than half of afflicted individuals are unaware that they have glaucoma, and therefore do not receive treatment. *See id.*

B. Visual Problems And Lack Of Access To Optometric Services In The United States Disproportionately Impacts Minorities

Government and private researchers have consistently found that affluent, Caucasian citizens of the United States enjoy better health and have better access to health care than do poorer, minority citizens. *See* Vera Thurmond & Darrell Kirch, *Impact of Minority Physicians on Health Care*, 91 S. Med. J. 1009, 1012 (1998) ("There is little argument that segments of the population in the United States, especially racial minorities, have not had equal access to health care services. Lack of access to health care was a predictable outcome of a largely segregated society."). These health disparities stem in part from differentials in health insurance coverage. Minorities are much less likely than whites to have health insurance. Thirty-seven percent of Latinos and twenty-three percent of African Americans are uninsured, while only fourteen percent of non-Latino whites are not covered by some sort of health insurance. *See* E. Richard Brown et al., *Racial and Ethnic Disparities in Access to Health Insurance and Health Care* 5 (Regents of the Univ. of Cal. 2000), *available at http://www.healthpolicy.ucla.edu-/pubs/files/RacialandEthnicDisparitiesReport.pdf.*

These disparities extend to visual disorders and disabilities. According to the National Institute of Health's *Healthy People 2010* report, "African Americans are twice as likely to be visually impaired as are whites of comparable socioeconomic status." *Vision and Hearing Report.* Since 1997, African American and Hispanic children have been reported to have a higher incidence of blindness and visual impairment than white children. *See* Healthy People 2010 Database, Focus Area: 28-Vision and Hearing, http://wonder.cdc.gov/data2010/focus.htm. Glaucoma, the number one cause of blindness among African Americans, has been reported to be three to four times more prevalent in

African Americans than whites. *See* Nat'l Eye Inst., *Strategic Plan on Reducing Health Disparities FY 2000-2004*, ("NEI Strategic Plan"), *at* http://www.nei.nih.gov/resources-/strategicplans/disparities.asp. Glaucoma also results in blindness for African Americans six times more often than it does for whites. *See id.* Similarly, Hispanics are two to three times more likely than whites to have diabetic retinopathy, visual problems resulting from diabetes. *See id.*

Minorities are also less likely to get treatment for visual impairment at every point in the age spectrum. For older blacks, under-treatment has been reported for cataract, diabetic retinopathy, and glaucoma. *See* B. Rahmani et al., *The cause-specific prevalence of visual impairment in an urban population: The Baltimore Eye Survey*, 103 Ophthalmology 1721 (1996); *NEI Strategic Plan* at Health Services Research. A study done in 1998 in certain Alabama public schools found that an estimated 28.3 percent of African American children needed eye care that was not being provided. *See* Janene Sims et al., *Need for Eyecare in a Minority Community* (1998). The authors attributed the excess eye care need in this minority population to lack of access, financial barriers, and a poor understanding of the importance of eye care for school-aged children. *See id.*

C. In Low-Income, Minority Communities, Lack Of Access To Eye Care Is Often A Function Of Cost

Cost is one the largest barriers to optometric care, especially for poor individuals. The AOA has estimated that more than 40 million low-income, working people in the United States cannot afford the cost of routine eye care or the health insurance that covers it. *See* AOA, Facts about VisionUSA, http://www.aoa.org/x1686.xml. Twenty-two percent of optometrists and ophthalmologists in Alabama identified financial need as the greatest barrier to eye care in their community. *See* Janet Bronstein & Michael Morrisey, *Eye Health Needs Assessment for Alabama* at 49 (2000). Like-

wise, a British study recently found that low-income individuals whose eye exams were not covered by government benefits were the least likely of all groups surveyed to have had a recent eye test. *See* J.C. van der Pols et al., *Is the Frequency of Having an Eye Test Associated with Socioeconomic Factors? A National Cross Sectional Study in British Elderly*, 53 J. Epidemiol. Cmty. Health 737, 738 (1999). Even patients with health insurance must often cover a significant portion of the cost of optometric care out of their own pockets, and are therefore affected by the cost of services. *See* U.S. Dep't of Health & Human Servs., *Visits to selected health care practitioners: United States 1980* at 10 (Pub. Health Serv. Nat'l Center for Health Statistics 1986) (finding that the patient or patient's family paid for 76 percent of the total amount paid for optometric services). Because the "prevalence of eye diseases . . . is directly associated with the accessibility, utilization, and quality of eye care services in the community," financial inaccessibility makes ocular health maintenance difficult for those in poor communities. *See* Edwin C. Marshall, *A Public Health Perspective to Clinical Health Care in Indiana*, 2 Ind. J. Optometry (1999), *available at* http://www.opt.indiana.edu/IndJOpt-/ijofall99.pdf.

Just as cost deters routine eye care for many individuals, reduction in the cost of vision services improves access to optometrists and increases the frequency of optometric visits. A 2003 study on the influence of out-of-pocket expenditures on the utilization of diabetes preventative services, for instance, found that individuals with diabetes were more likely to get annual dilated eye exams if the cost was covered by health insurance or reduced to a co-pay than if the eye exams were full-priced. *See* Andrew Karter et al., *Out-of-Pocket Costs and Diabetes Preventative Services*, 26 Diabetes Care 2294 (2003). When costs are high, low-income, minority individuals are also more likely to delay routine, non-essential eye examinations. *See id.* at 2298 (noting that "pa-

tients are more price sensitive when they perceive a health service as optional"). This delay, in turn, may aggravate existing problems or even render them untreatable. *See* Section I.A., *supra*. A reduction in the cost of optometric care is therefore an essential ingredient in improving the visual health of minority communities.

D. The Competition Provided By Corporate Optical Chains Increases Accessibility Of Optometric Care To Minority Communities By Reducing Costs And Increasing Convenience

The availability of optometric care at corporate retail optical establishments plays an important role in lower-income and minority communities. These establishments provide an easy way for minorities, who often do not have a usual source of health care, to seek visual treatment. *See* 1 *Healthy People 2010: Access to Quality Health Services* ch. 1, at http://www.healthypeople.gov/Document/HTML/Volume1/01Access.htm (describing the large numbers of minorities without a usual source of health care). Even more importantly, there is substantial evidence that commercial practice restrictions that limit the corporate practice of optometry – such as Tennessee Code § 63-8-113(c)(6) – increase consumer costs. Conversely, the presence of optometric services at retail optical chains reduces the cost of services, increasing the accessibility of eye care to minority and low-income communities.

In the mid-1970s, Federal Trade Commission ("FTC") staff began an investigation into state and private restraints on advertising of ophthalmic goods and services. After accumulating evidence that restrictions on commercial practice significantly limited competition and increased prices, the FTC decided to expand its inquiry. In two separate studies, FTC staff examined the effects of state restrictions prohibiting certain forms of lay association with optometric practices and prohibiting the practice of optometry in certain commer-

cial locations on the price and quality of optometric care and contact lens fitting. *See* Ophthalmic Practice Rules, 54 Fed. Reg. 10,285, 10,287 (Mar. 13, 1989). These studies found prices for eye exams and eyeglasses to be 18 percent higher in markets without chain firms than in markets with retail optical establishments. *See id.* at 10,288. In reciting the evidentiary record for rulemaking, the FTC concluded

> (1) That average prices for eye exams and eyeglasses are lower in markets with chain firms than in markets without chain firms; (2) that chain firms and other large-volume providers charge significantly lower prices than noncommercial providers; and (3) that each of the restrictions imposes unnecessary costs on commercial practice that impede its development and raise prices to consumers.

Id.[2]

Other studies have also considered commercial practice restrictions, concluding that they increase prices without significantly impacting the quality of eye examinations or contact lens fittings. *See* Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry*, 29 J.L. & Econ. 165 (1986). Business practice restrictions also deter large retail optical chains from entering the market, reducing consumers' options for low-cost ophthalmic goods. *See* Deborah Haas-Wilson, *Strategic Regulatory Entry Deterrence: An Empirical Test in the Ophthalmic Market*, 8 J. Health Econ. 339, 351 (1989) (concluding that "form of practice" restrictions have been used to deter entry and maintain higher prices).

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[2] Although the D.C. Circuit later vacated the regulations issued based on these findings on the ground that the FTC lacked statutory authority to promulgate them, it did not question the factual findings on which the regulations were based. *See Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 979 (D.C. Cir. 1990).

The FTC recently re-confirmed the conclusions drawn from empirical study of and practical experience with restrictions on optometric practice. *See* Letter to Senator Crutchfield from Timothy Muris, FTC Chairman (April 29, 2003), http://www.ftc.gov/be/v030009.htm. In response to a request to comment on Tennessee's restrictions, then-Chairman Muris observed that it was likely that the Tennessee law would reduce competition, thereby negatively impacting the prices, variety, and quality of good and services. The letter also referenced the FTC's earlier studies, reaffirming the findings that restrictions tend to drive up prices, that higher prices lead price sensitive consumers to defer seeking eye care, and that there is no evidence that the kind of restrictions at issue in Tennessee improve the quality of services. *See id.* at n.16 ("[W]e have identified no change in the marketplace that economic analysis suggests would likely reverse or eliminate the price effect if a new study were conducted with more recent data.").

In addition to reducing the costs associated with eye and vision care, the competition provided by corporate optical chains increases accessibility of optometric care to minority communities by making eye and vision care more convenient. Optical chains often are located in enclosed or strip shopping malls, or otherwise in close proximity to other retail establishments. Such a setting provides consumers with the ability to seek eye and vision care without neglecting other daily tasks. In addition, such retail-heavy locations tend to mean hours of operation that are more convenient and better suited to the schedules of those with less flexible work or childcare arrangements.

In Tennessee, where roughly a quarter of African Americans and Hispanics or Latinos live below the poverty line, entry of retail optical chains will not immediately solve the racial disparity in access to optometric services. But the competition generated by retail optical firms and the conse-

quent reduction in the cost of services, along with an increased number of optometrists, can only help to reduce visual health disparities in the underserved minority population.

II. THE PRACTICE OF OPTOMETRY IN CORPORATE RETAIL SETTINGS IS A GATEWAY INTO THE PROFESSION FOR OPTOMETRISTS AND OPTICIANS OF COLOR

Beyond improving accessibility of eye care to minority communities by decreasing cost, retail optical chains serve an important function for entry-level minority optometrists. The corporate practice of optometry allows optometrists to gain experience in their chosen practice even if they do not have a significant amount of capital or are not willing to take serious financial risks. Because many minority optometrists fresh from optometry school, facing the repayment of thousands of dollars of student loans, do not have the resources or connections necessary to begin their career in private practice, retail optical chains provide one of the few possible entries into the profession. The statute at issue in this case strips away that possibility, creating one more barrier for minorities in Tennessee interested in improving minority representation in the field of optometry.

A. The Need For Minority Optometrists

Minorities are woefully underrepresented in the field of optometry. Only about 600 of the approximately 32,000 practicing optometrists nationwide, or less than 2 percent, come from minority backgrounds. Penn. College of Optometry, Opportunities for Minorities in Optometry, http://www.pco.edu/acad_progs/Optometry/od_minorities1.htm. Nor are the rates of minority optometrists rapidly improving. Although 24 percent of 2004 optometry school graduates were Asian, only 2.4 percent were African American, only 5.9 percent were Hispanic or Latino, and only 0.3 percent were Native American or Native Alaskan. *See* Ass'n

of Schools & Colleges of Optometry, Student Profile, http://www.opted.org/info_profile.cfm.

The low numbers of minority optometrists impact both the profession of optometry and minority eye care. Minority optometrists help improve awareness of the need for optometric services within minority communities. Many individuals, especially those from underserved communities, are simply unaware of the importance of routine eye examinations, contributing to their failure to seek out or receive regular visual care. But when individuals are educated about the need for routine eye examinations or have more direct access to optometrists, they are more likely to undergo routine eye examinations. *See* Press Release, Nat'l Eye Inst., Health Education Leads to More Eye Exams in Group at Risk for Vision Loss (Dec. 6, 1999) (describing study finding that diabetic African Americans were more likely to have timely eye examinations when they were educated about the need for them and telephoned for counseling). Minority optometrists play a special role in raising the profile of optometry in underserved minority communities, acting as a bridge to patients with different values and beliefs. Studies have found, for instance, that minority physicians "serve[] disproportionately more patients of their own racial or ethnic group" and are more likely to provide health care for underserved populations in areas designated as health manpower shortage areas by the federal government. *See* Thurmond & Kirch, *supra*, at 1009-10. It follows that the dearth of minority optometrists directly contributes to the poor eye and vision care of underserved minority communities.

B. The Obstacles Preventing Minorities From Entering Optometric Practice And The Solution Presented By Corporate Optometry

The low matriculation of minority students in optometry school is a clear result of the myriad obstacles faced by minority individuals seeking to practice optometry. Some of

these hurdles are systemic; admission to optometry school requires a bachelor's degree, for instance, an educational level obtained by comparatively fewer people of color. Other barriers relate to the low numbers of minority optometrists in the field. Minority students often face "a lack of mentors, encouragement in their academic pursuits or family financial assistance before entering the program." *See* Marlee Spafford et al., *Diversity within the Profession, Part 1: Trends and Challenges*, 27 Optometric Ed. 114, 117 (2002).

Optometry school poses another serious impediment: cost. For the 2005 school year, Southern College of Optometry, the only optometry school located in Tennessee, estimated that costs for four years of education for a non-regional student would amount to around $130,000, and costs for a regional student would amount to around $110,000. *See* Southern College of Optometry 2005-2006 Catalog, Tuition & Fees, *available at* http://www.sco.edu/catalog/. Other optometry schools are similarly expensive, with tuition ranging from $11,000 per year to $40,000 per year for the four years required for optometry school. *See* Ass'n of Schools & Colleges of Optometry, Profile for 2005 Entering Class, *available at* http://www.opted.org/info_profile2.cfm. By the time they graduate, many new optometrists have accumulated $100,000 or more in student loan debt.

Facing repayment of student loans, many minority optometrists must generate some type of income reasonably soon after graduation. Immediate self-employment is often not an option for newly minted minority optometrists because of lack of experience, a shortage of contacts tied into the existing social networks, and the difficulties in obtaining the "factors that determine successful self-employment (obtaining supportive capital, developing a stable client base, community support and sufficient management training)." *See* Spafford, *supra*, at 118.

Without such contacts and access to capital to finance expensive equipment, prospects can be bleak for recently-graduated minority optometrists. This is precisely where the "turnkey" opportunities of the corporate practice of optometry are most important. The typical "turnkey" leases used in corporate practice arrangements provide not just for the leasing of physical space in the retail eyewear establishment, but also for the equipment optometrists use in their practice. The ability to lease equipment on favorable terms is indispensable for many new entrants to the profession, particularly those new entrants of color, many of whom may not have the working capital or access to capital to procure the very expensive equipment concomitant to an optometry practice.

In this situation, corporate optometry may well be the only door open to those who want to practice optometry. Like women, few minority optometry graduates begin their practice of optometry in the more lucrative private office setting. *See* AOA, *National Highlights: 2001 AOA Economic Survey* 4, *available at* http://www.optometrysmeeting.org-/documents/EconHighlights2001.pdf; Spafford, *supra*, at 117-18. Instead, minority graduates from optometry school more commonly must seek other options for practice, avoiding the unaffordable start-up costs of private practice, and the concerns over "flat revenues, decreasing market share, minimal growth of new patients, and even a loss of patients using the office" due to the uncertainty of patients and insurance programs. *See* Gary Moss & Peter Shaw-McMinn, *Why Optometrists Need to Market*, Optometry at 471 (2001).

Corporate practice also allows new graduates to practice optometry without the added preoccupation of having to sell eyewear in order to sustain a practice – a benefit crucial to the professional development of new entrants. In the corporate practice of optometry, the optometrist can leave the selling of eyewear completely to the retail establishment from which he or she is leasing space and equipment. Every min-

ute a relatively inexperienced optometrist can spend focused on patient care rather than "selling from the chair" helps to produce a diverse corps of quality eye care professionals to serve the public for years to come.

A significant portion of the NOA membership is engaged in the corporate practice of optometry, and, in the experience of NOA leadership, most students of color graduating from schools of optometry are entering the corporate practice of optometry. By providing a place where minority optometrists can join the profession without having to bear the expense of buying into or establishing a practice, the corporate practice of optometry opens doors in the profession to minorities where they otherwise would face only obstacles. Unfortunately, the restriction on the corporate practice of optometry in Tennessee Code § 63-8-113(c)(6) puts a roadblock in the path that many minorities take to gain experience in the profession. For newly graduated minority optometrists with large amounts of student loan debt, no financial resources, no experience, and few, if any, connections, this statute leaves minimal options for practice in Tennessee.

III. THE TENNESSEE STATUTE RUNS AFOUL OF THE DORMANT COMMERCE CLAUSE AND CONCOMITANTLY LIMITS THE AVAILABILITY OF EYE AND VISION CARE IN MINORITY COMMUNITIES

As the petition amply demonstrates, the Tennessee statute at issue is unconstitutional because it discriminates against interstate commerce. The statute also undermines the goals of the Commerce Clause by decreasing the availability of a vital consumer service – eye and vision care – a consequence that has the greatest adverse impact on underserved communities of color.

Promoting a free marketplace and fostering a national economy are primary purposes behind the Commerce Clause. *See, e.g., Hunt v. Wash. State Apple Adver.*

Comm'n, 432 U.S. 333, 350 (1977) (referring to "the Commerce Clause's overriding requirement of a national 'common market'"); *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (the Court's "negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market"). Central to this understanding of the Commerce Clause is the belief that consumers benefit when provided options in the marketplace. *See, e.g., H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.").

The discriminatory effect of the Tennessee statute on interstate commerce decreases the availability of eye and vision care for those in underserved communities – those consumers who can least afford to be deprived of choice and affordability in the marketplace. As we have explained, the corporate practice of optometry often provides an affordable and accessible source of eye and vision care to minority communities that otherwise would be lacking. To the extent that the Tennessee statute constrains choice in the eye care market by unfairly and unreasonably restricting the corporate practice of optometry, the adverse consequences of such discriminatory conduct fall disproportionately upon minority communities. One way the statute diminishes choice in the eye care market is by largely eliminating optometry positions that do not require connections inside Tennessee or the financial resources necessary to build a practice. By restrict-

ing corporate practice, the Tennessee statute therefore creates a barrier to entry for those optometrists – those from outside the state – without ties or preexisting patients in Tennessee. It favors the optometrists already doing business in the state by increasing the expenses necessary to begin establishing a practice in the state in contravention of the Commerce Clause.

Tennessee can and should utilize available less restrictive and non-discriminatory means of achieving its purported goals in order to remain within the confines of the dormant Commerce Clause and to avoid the diminishing impact the statute has on the availability and accessibility of eye and vision care in underserved communities of color. The statute is unconstitutional – and the decision below upholding it should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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